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Seminar on Evidence and Trial Practice

Office of Continuing Legal Education at the University of Kentucky College of Law

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87-88

PAINTSVILLE.....AUGUST 14, 1987
FT. MITCHELL.....AUGUST 28, 1987
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Presented by the
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The University of Kentucky, College of Law, Office of Continuing Legal Education, was organized in Fall of 1973, as the first permanently staffed, full-time continuing legal education program in the Commonwealth of Kentucky. It endures with the threefold purpose of assisting Kentucky lawyers: to keep abreast of changes in the law resulting from statutory enactments, court decisions and administrative rulings; to develop and sustain practical lawyering and litigation skills; and to maintain a high degree of professional competence in the various areas of the practice of law.

An enormous debt of gratitude is owed to those who contribute their time, expertise and practical insight for the advance planning, the instructional presentations, and the written materials that make our seminars possible.

The Office of Continuing Legal Education welcomes correspondence and comment regarding our overall curriculum, as well as our individual seminars and publications. We hope the seminars and the materials distributed in conjunction with them provide attorneys with the invaluable substantive and practical information necessary to resolve society's increasingly complex legal problems in an efficient and effective manner. To the extent that we accomplish this, we accomplish our goal.

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Robert G. Lawson
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Lexington, KY

9:50 a.m. **Relationships Between The Attorney, The Client and The Evidence in Trial Practice**
William H. Fortune
Dorothy Salmon Professor of Law
University of Kentucky College of Law
Lexington, KY

10:40 a.m. BREAK

10:55 a.m. **Problems In Jury Selection: Demonstrating and Evaluating the Methods**
Thomas L. Osborne
Osborne & Harris
Paducah, KY

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Richard H. Underwood
Alumni Professor of Law
University of Kentucky College of Law
Lexington, KY

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William R. Garmer
or
Robert L. Elliott
Savage, Garmer & Elliott, P.S.C.
Lexington, KY

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Peggy E. Purdom
Welch & Purdom
Ashland, KY

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Andre E. Busald,
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Busald, Funk & Zevely
Florence, KY

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5:00 p.m. ADJOURN

DEVELOPMENTS IN EVIDENCE LAW

Robert G. Lawson
Dean
University of Kentucky College of Law
Lexington, Kentucky

Section A

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DEVELOPMENTS IN EVIDENCE LAW--1987

by

Robert G. Lawson

I. Introduction: The cases selected for discussion in this paper have only one common criterion; they provide interesting and valuable instruction in the law of evidence. They were selected partially because of the breadth of their application, meaning that the rulings in criminal cases would apply in civil litigation and vice versa. There is a mix of federal and state court opinions, but even here an attempt was made to select cases which would likely be followed in all courts. The objective of the lecture is not simply to provide an update on recent decisions but rather to use recent decisions as a basis for discussion of some important areas of evidence law.

II. Preliminary Findings of Fact:

A. Introduction: In many instances, the admissibility of evidence depends upon proof of preliminary facts. For example, a dying declaration is admissible only if shown to have been made under a consciousness of impending death. And a copy of a record might be admissible only if the original is shown to have been lost. In the totality of the law of evidence, there are hundreds of such preliminary requirements. And, needless to say, with respect to each there can be a conflict in the evidence offered by the parties. The trial judge must resolve this conflict in order to rule on admissibility. With respect to this part of the trial court's responsibility, there is an important body of law for lawyers to know. The Supreme Court of the United States recently decided an important case in this area.

B. Bourjaily v. United States, 41 Crim. L. Rep. 3350 (June 23, 1987).

1. Facts: The evidence in question was a out of court statement offered under the hearsay exception for statements of coconspirators. Such statements are admissible under the Federal Rules only upon preliminary proof of the existence of a conspiracy and of the involvement in that conspiracy of the person against whom the evidence is offered. In this case, there was a dispute in the evidence on both of these preliminary facts. The trial judge resolved the conflict against the defendant in this case and admitted the evidence. The defendant challenged this ruling before the Supreme Court on two grounds: (1) He argued that in admitting the hearsay the trial judge erronously used the preponderance of evidence standard in resolving the conflict on the preliminary facts; and (2) he argued that the trial judge erred in using the content of the hearsay statements to find the preliminary facts needed for admissibility of the hearsay (i.e., he bootstrapped the hearsay into evidence). The Supreme Court sustained the rulings of the trial judge.

2. Standard of Measurement: Rule 104(a) of the Federal Rules imposes on the trial judge the obligation of resolving disputes of fact crucial to admissibility of evidence. But, it does not define the standard of proof to be used by the judge in resolving such disputes.

i. Most courts have used preponderance of evidence as the standard of proof for most preliminary issues, even in dealing with admissibility of evidence against a criminal defendant. But there have been exceptions to this rule. For example, some courts have required that a conspiracy be proved by clear and convincing evidence before admitting statements by coconspirators. And most federal courts require that evidence of other bad acts be proved by clear and convincing evidence before being admitted against an accused.

ii. In Bourjaily the Supreme Court ruled that admissibility determinations under the Federal Rules which hinge on factual questions are to be resolved by the preponderance of evidence standard. The Court mentions no exceptions to the rule.

iii. The Court specifically noted that it was not ruling on the standard of proof to be used for issues arising under Rule 104(b). These issues carry the label "conditional relevancy" and have traditionally imposed on the offering party a lesser standard of proof. Authentication of writings is an example of a conditional relevancy issue.

3. Bootstrapping Evidence: The Supreme Court ruling on this second issue is far more important than its first ruling and a bit more surprising.

i. Rule 104(a) of the Federal Rules provides that in determining preliminary questions concerning admissibility, the trial court is not bound by the rules of evidence law (except for privileges). This is the rule that turned out to be pivotal.

ii. One clear implication of Rule 104(a) is that a trial court may consider hearsay evidence in resolving preliminary issues. On this point there has been no doubt or controversy.

iii. However, in decisions predating the adoption of the Federal Rules, the Supreme Court had indicated (if not held) that in ruling on admissibility of evidence a trial court must rely only on independent evidence (i.e., not that whose admissibility is in question) in resolving preliminary fact questions. In Bourjaily the defendant tried to rely on these earlier cases.

iv. The Court held that Rule 104 allows the trial judge to consider any evidence whatsoever in making his rulings on admissibility to the jury, except for evidence protected by privilege. This includes the evidence whose admissibility is being decided, said the Court.

v. In so ruling the Court expressly declared that it was not deciding whether or not a judge could base a finding of a preliminary fact solely upon the evidence whose admissibility was being determined. It said: "It is sufficient for today to hold that a court in making a preliminary factual determination under Rule 801(d)(2)(E) may examine the hearsay statement sought to be admitted."

vi. This is an important ruling with wide application.

III. Video and Film Demonstrations:

A. "Day in Life" Films:

1. Bannister v. Town of Noble, 812 F.2d 1265 (10th Cir. 1987): The defendant had a road crew working on a highway without warning signs for motorists. Plaintiff came upon the scene of the construction, drove his car off the highway and crashed. He suffered serious injuries and became a paraplegic. At trial he was allowed over objection to use a videotape presentation to show how the injury had affected his daily routine. A typical "Day in the Life" film, it was prepared solely for litigation and showed a variety of everyday situations involving the plaintiff. The defendant objected to the evidence under Fed.R.Evid. 403 on the ground of undue prejudice. The videotape was admitted and the plaintiff got a verdict. The defendant appealed.

i. The Court said that the Day in a Life films raise special concerns about prejudicial impact. The trial court must determine on a case by case basis whether this prejudice is outweighed by the probative value of the evidence. The determination is within the discretion of the trial court and will be reversed on appeal only upon a showing of abuse.

ii. The Court identified several factors to be weighed in making the decision on admissibility: (1) The film must fairly represent the impact of the injuries on the plaintiff's day-to-day activities and would not do so if it depicted the victim in unlikely circumstances or doing improbable tasks; (2) exaggerated difficulties in performing ordinary tasks presents a danger of prejudice; (3) conduct that serves little purpose other than to create sympathy for the plaintiff is highly prejudicial; (4) film evidence is likely to have a dominating effect over conventionally elicited testimony, a factor which must be taken into account in

weighing probative value against prejudice; and (5) the presence of the victim for cross-examination reduces the risk of undue prejudice and is a factor for consideration.

iii. The Court held that the judge carefully weighed prejudice potential against probative value and that it could not find an abuse of his discretion.

Special Note: This case considered another interesting question about the use of Day in the Life films. In his closing argument in this case, the plaintiff's lawyer showed the jury a videotape which included part of the Day in the Life film, part of another videotape demonstration of how the vehicle flipped, and part of a physician's taped deposition. Objection was made to this form of closing argument and overruled. The Court held on appeal that this was within the discretion of the trial judge.

2. Bolstridge v. Central Maine Power Co., 621 F.Supp. 1202 (D.C.Me 1985): The admissibility of a Day in the Life film was questioned in this case as well. The evidence was ruled inadmissible. The court gave several reasons: (1) an edited tape necessarily raises issues of whether the event shown is fairly representational of fact; (2) it raises issues of undue prejudice because of the manner of presentation; (3) because the plaintiff is aware of being videotaped for purposes of litigation, the film is likely to cause self-serving behavior; (4) the film is troublesome because it dominates evidence more conventionally produced; and (5) it distracts the jury from other cogent issues which must be considered to produce a fair verdict.

i. The Court did not rule such films inadmissible per se.

ii. It ruled that it should be admitted only when the tape conveys observations of a witness to the jury more fully and accurately than for some specific, articulable reason the witness could convey them through conventional examination.

B. Videotape Demonstrations:

1. General: For a long time, the law has recognized the admissibility of filmed experiments or demonstrations purporting to duplicate the event or accident involved in the litigation.

i. Basic Requirement: It is generally stated that the evidence is admissible only if the experiment or demonstration was conducted under substantially similar conditions to those which existed at the time of the accident. However, it is also said that "admissibility

. . . does not depend on perfect identity between actual and experimental conditions. Ordinarily, dissimilarities affect the weight of the evidence, not its admissibility." Randall v. Warnaco, Inc., 677 F.2d 1226, 1233-34 (8th Cir. 1982).

ii. Discretion: The rule stated above obviously calls for a judgment by the trial judge about the degree of similarity between the experiment and the event under litigation. Consequently, the appeals courts have said with respect to this evidence that "the admissibility of evidence of experimental tests rests largely in the discretion of the trial judge and his decision will not be overturned absent a clear showing of an abuse of discretion." Sprynczynatyk v. General Motors, 771 F.2d 1112,1124 (8th Cir. 1985).

iii. Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985), is illustrative of situations in which abuse of discretion may be found in admitting such evidence. This was a products liability case involving a tire rim explosion. The film in question was based on a demonstration involving a different rim than the one involved in the accident under litigation with significant differences in air pressure in the two situations (among other differences). The ruling of the trial judge admitting the evidence was found to be an abuse of his discretion.

2. Demonstrating Principles of Physics: Recent cases involving videotape of experiments or demonstrations seem to have added a new wrinkle to this area of the law. It is one that makes application of the foregoing principles more difficult than they would otherwise be. The following cases are illustrative:

i. Bannister v. Town of Noble, supra: In this case the plaintiff's car left the highway at a construction site and crashed. At trial the plaintiff was permitted to introduce a videotape of an experiment in which a car like the one involved in the accident was run over an inclined ramp to become airborne before landing. It was offered by the plaintiff not as a recreation of the accident but as a demonstration showing "the trajectory of this type of car with this type of suspension system." The defendant argued that it was an attempted recreation of the accident and had substantial dissimilarities with the actual accident. Held: the evidence was introduced to demonstrate physical principles and not to recreate the accident; thus, the ruling by the judge was not an abuse of discretion.

ii. Champeau v. Fruehauf Corp., 814 F.2d 1271 (8th Cir. 1987): This was a products liability case against the manufacturer of the trailer vehicle of a

tractor-trailer rig. The claim was that the brakes on the trailer failed, caused the vehicle to jackknife, and injured the driver's neck. The plaintiff testified at trial that he was driving the vehicle on a winding road at 35 mph, braked a quarter mile before reaching a curve, had a brake failure, tried to brake twice more, and jackknifed in the curve. At trial the defendant introduced evidence of a videotape experiment showing that a rig driven as the plaintiff claimed he drove the one involved in the accident would have coasted to a stop before reaching the curve under conditions described by the plaintiff. The experiment was not conducted under circumstances identical to the ones involved in the accident. The Court ruled the evidence admissible nonetheless: "The experiment did not need to be performed in similar circumstances in order to be admissible because it did not purport to be a recreation of the accident and it was merely used to demonstrate general principles of physics as applied to [plaintiff's] testimony." Id. at 1278.

iii. Szeliga v. General Motors Corp., 728 F.2d 566 (1st Cir. 1984): This was a products case. The plaintiff's car left the highway, struck a concrete culvert, and stopped among some trees. He claimed that the wheel came off and caused him to lose control of the car. The defendant claimed that he left the highway negligently and that the wheel was torn off when the car hit the culvert. At trial, the defendant was permitted to introduce a film of a demonstration of a vehicle being run on a track until the wheel struck a concrete block barrier and lost that wheel when it came over the lug nuts. This film was used by an expert witness to testify that the cause of the accident was as the defendant alleged. The appeals court ruled that the film had been properly admitted: "They were not offered as a re-creation or representation of how the accident actually happened. The films depicted an experiment illustrating Tomlinson's theory of the cause of the accident. They were an aid to the jury's understanding of his testimony. . . ." Id. at 567.

iii. The Problem: The difficulty involved in dealing with the new wrinkle is illustrated well by the case of Gladhill v. General Motors Corp., 743 F.2d 1049 (4th Cir. 1984). The plaintiff bought an automobile manufactured by the defendant and immediately began to experience trouble with the brakes; the brakes would occasionally lock with only slight pressure on the petal and cause the car to skid. He took the car in for repairs but no flaws were found. Shortly after that he was driving the car when it collided with a utility pole causing him serious injuries. He sued alleging a design defect which caused the brakes to lock. At trial the defendant was permitted to show a

videotape demonstration of a braking test of a vehicle of the same type. There was great differences in the conditions under which the test was conducted and those which existed at the time of the accident; for example, the accident involved travel down a sloping hill and into a sharp curve while the test was on a flat surface with the vehicle going straight. Objection was made to the film and the defendant responded that it was not being offered as a recreation of the accident but only to establish certain operating characteristics of the vehicle. The film was admitted into evidence.

On appeal, the Court said "it is possible to call almost any evidence of this type 'a demonstration to illustrate a principle'". It concluded that this film portrayed a physical representation of how the automobile would operate under given conditions and that such evidence should not be permitted unless the substantial similarity requirement is met. Otherwise, the opposing party will be prejudiced by the evidence.

IV. Medical Records--Hearsay and Opinion Concepts:

A. Introduction: The case of Ricciardi v. Children's Hospital Medical Center, 811 F.2d 18 (1st Cir. 1987), presents some issues of interest and importance with respect to the admissibility and use of medical records. The case involved a malpractice action against doctors and a hospital for neurological difficulties suffered by the plaintiff after open heart surgery. The alleged negligence occurred according to the plaintiff when a device used for circulating the blood from the heart-lung machine back into the body during the heart bypass came out accidentally. There was a denial of the allegation.

1. At trial, the plaintiff offered into evidence a note on his medical chart which indicated that during the surgery there was an episode of the device in question being accidentally out for 40 to 60 seconds. The note was dated two days after the operation and was made by a neurology resident. This was the plaintiff's sole evidence of negligence. Objection was made to its admissibility on hearsay grounds. The trial judge ruled it inadmissible after learning that the neurology resident lacked personal knowledge of the incident and could not recall who had given him the information about the incident. The plaintiff attempted to have his expert witness express an opinion that the cause of his problems was an injurious embolus which resulted when the device in question came out. The expert could express this opinion only by relying on the note. The trial court ruled the opinion improper. With no other evidence to introduce, the plaintiff lost by directed verdict. He appealed and lost again.

2. The fact situation presents important questions about the application of the business records exception to medical records. And, it presents an important question about the right of an expert to rely on hearsay in forming opinions.

B. Hearsay and Medical Records:

1. General: Business records are admissible under Fed.R. Evid. 803(6); this rule is indistinguishable from the rule which is followed in state courts in Kentucky. Medical records are treated as business records and are generally admissible under this exception. The most important point made by this case is that the mere fact that information is contained in a medical record does not make it admissible under the law of hearsay. For several reasons, specific information contained in records that are generally covered by the business records exception may be inadmissible.

i. Probably the most common reason for excluding information contained in hospital records is that it lacks pertinence to treatment or diagnosis--which is what gives such records their special trustworthiness.

ii. The reason the information in Ricciardi is not admissible involves the prerequisites for application of the business records exception to the hearsay rule.

2. Personal Knowledge Requirement:

i. Basic Requirement: To be admissible as hearsay, a business record must be made by someone with knowledge of the event recorded in the record or on the basis of information provided to the recorder by someone who has personal knowledge of the event and a business duty to report it. Proof of this fact is a part of the foundation for introducing business or medical records.

ii. In Ricciardi the maker of the entry in question did not have personal knowledge of the incident recorded in the medical chart. In his testimony he said that he did not know the source of the information which caused him to make the entry; he said that he normally spoke with nurses and staff attending a patient before, during, and after surgery. In this instance, however, he could not recall speaking with any members of the surgical team.

iii. Ruling: The record in not admissible under the business records exception because of the absence of proof of the source of the information: "An unknown source is hardly trustworthy." Id. at 23.

iv. Note: An argument could be made that the proof of circumstances in this instance provided sufficient evidence of the source of the information to satisty the prerequisite for admissibility. The entrant was a physician who was involved in treating the patient, he usually got information from members of the surgical team (although he could not recall doing so in this instance), and the information itself is indicative of

a source who would have personal knowledge. The contrary ruling of the court shows the importance of understanding the prerequisites for admissiblity of such records.

3. Other Hearsay Exceptions: The plaintiff attempted to gain admissibility of the chart entry under the exceptions for past recollection recorded, residual hearsay, and adoptive admissions.

i. It was ruled inadmissible under past recollection recorded for the same reason it was excluded under the business records exception. The recorder must be shown to have had personal knowledge of the matter contained in the record. He did not in this instance.

ii. It was ruled inadmissible under the residual exception because of a belief by the Court that the record did not satisfy the requirement that such hearsay have "circumstantial guarantees of trustworthiness equivalent" to that which exists with other hearsay exceptions. Since it did not satisfy the trustworthiness requirements of the business records exception it could not be admissible as residual hearsay.

iii. The strongest alternative argument was that the chart entry was an adoptive admission by the defendants. The Court indicated that if the plaintiff had proved that the chart had been read by the defendant physicians without objection to the specific entry then the record could have been admitted as an adoptive admission. This proof was lacking; the record was not admissible under this exception.

C. Hearsay and Expert Opinion:

1. Introduction: The plaintiff attempted to overcome his inability to get the chart entry into evidence by relying on Fed.R.Evid. 703 which allows experts to use inadmissible hearsay evidence in the formulation of opinions. The record would not be substantively admissible but could form the basis for admissible opinion. In this instance, this approach might have saved the plaintiff's case by giving him some evidence (the expert's opinion) of negligence.

i. Rule 703 requires that information relied on by the expert be of a type reasonably relied upon by experts in formulating opinions on the subject. The Kentucky law is identical to this, although it uses the word "customary" in place of "reasonable".

ii. The expert witness told the court that if he could rely on the chart entry it would be his opinion that the cause of the plaintiff's injuries was that the

device in question had come out during surgery. Without the chart entry he could not express that opinion.

2. Ruling: The Court held that the expert could not rely on the chart entry in forming his opinion.

i. In so ruling the Court said that the plaintiff had not established the prerequisite described above, namely, "reasonable reliance". It did not say that the prerequisite could never be satisfied in a comparable situation.

ii. The testimony of the expert about the inadmissible information will usually be critical on the preliminary issue of "reasonable reliance". If he says that the information is of the type experts usually rely upon then the judge will have to decide if the experts are reasonable in so doing. In this case, the expert said that the entry was "bizarre" and that he had never seen such an entry in a medical chart. This is short of the proof needed for use by an expert of inadmissible hearsay.

V. Opinion Testimony:

A. Introduction: Opinion testimony, particularly from expert witnesses, continues to be troublesome under Kentucky law. It is difficult to reconcile decisions of the appeals courts and to predict what kind of opinion testimony is admissible and what is not admissible. A few years ago the Supreme Court of Kentucky reinstated the rule prohibiting testimony on an ultimate fact, which is the opposite of what the Federal Rules did. At least some of the difficulty in the law is attributible to the problems involved in determining what is and is not an ultimate fact. With this background, an effort is made below to present some of the recent Kentucky cases on opinion evidence.

B. Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987): The defendant killed her husband after a stormy marriage during which she had been beaten, threatened with death, and otherwise abused on numerous occasions. On the night of the shooting, according to the defendant, she was kicked and threatened. She got a gun from the bathroom, shot her unarmed husband between the eyes, and of course caused his death instantly. She defended on the grounds of self-defense. At trial she called as a witness a registered nurse with extensive experience in cases involving women who had been beaten by their husbands. She was permitted to testify about characteristics and consequences of what is called "battered wife syndrome", specifically why an abused wife stays with her husband and the reaction that follows. She was not permitted, however, to testify that the accused was suffering same at time of the shooting and she was not permitted to testify that the accused feared for her life at the time of the shooting.

The Court of Appeals ruled that it was error not to allow this testimony. The Supreme Court ruled otherwise and sustained the trial court ruling.

1. General Scientific Acceptance: In 1982, in the case of Brown v. Commonwealth, 639 S.W.2d 758 (Ky. 1982), the Supreme Court seemed to reject the requirement that evidence based on scientific principles had to have received general scientific acceptance in order to be admissible. But the court has definitely ignored the ruling in Brown since then; the requirement is alive and well in Kentucky.

i. In a case by the name of Lantrip v. Commonwealth, 713 S.W.2d 816 (Ky. 1986), the Court had ruled expert opinion on what is called "sexual abuse accommodation syndrome" inadmissible because of the absence of evidence of general scientific acceptance.

ii. In Rose the Court distinguished Lantrip and found that there was evidence sufficient to demonstrate the scientific acceptability of the battered wife syndrome. On this basis, the Court concluded that a qualified witness could testify about this concept.

2. Scope of Admissible Expert Opinion: The Court ruled that it was proper for a qualified expert to testify about the battered wife syndrome. It viewed this as scientific evidence and found that it would assist the trier of fact in resolving the issues of the case; of course, "assist the trier" is the standard used in the Federal Rules to judge the admissibility of all expert testimony. The Court ruled that a qualified witness would not be permitted to testify that a particular accused suffered the syndrome or that the accused believed in the need for self defense at the time of alleged crime.

i. The Court, in denying the testimony, seemed to rely upon the ultimate fact doctrine.

ii. It is difficult to see how testimony that the accused had the syndrome is an ultimate fact. It is also easy to see how the jury would be aided by such testimony from a qualified witness.

iii. It is easy to see that the opinion about the accused's belief in the need for self defense is an ultimate fact. It is also easy to see how the evidence could be excluded without reliance on the ultimate fact rule, which makes application of opinion law difficult. The opinion runs to a person's state of mind, involves much speculation, adds little to what the jury could do on its own from the other evidence, and thus does not assist the jury.

C. Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987): The plaintiff was injured in an automobile accident at a time when she was not wearing her seat belts. Prior to trial, the defendants employed a physician to examine the plaintiff and offer testimony. At trial the defendants offered into evidence testimony that the plaintiff was not wearing her seat belts and opinion evidence from the physician that had the plaintiff been wearing her belt she probably would not have suffered the injuries which she received and which necessitated medical care. The trial court ruled the seat belt evidence inadmissible. This ruling was the principal subject of the Court's opinion.

1. General Rule on Seat Belt Evidence: In dealing with the seat belt question, the Court framed the issue as one which involves simply an issue of relevancy under the law of evidence. Is evidence of the type offered in this case relevant to the element of contributory fault? The Court held that it was relevant and could be proved by a competent expert witness.

2. Competency of Witness: In this case the plaintiff argued that even if such evidence is held relevant the physician was not competent as an expert to testify that the injuries would not have occurred had the plaintiff been wearing seat belts. The Supreme Court did not resolve this question, believing that it had not been considered fully at trial. It said that the qualifications of the witness seem to be limited to familiarity with medical literature (apparently on the subject) and expressed some doubts about the qualifications of the witness. However, the Court concluded that "the decision as to whether a witness is qualified to give expert testimony rests initially in the sound discretion of the trial court." Id. at 179.

3. Special Comment: In this opinion, it is worthy of note that the Court said nothing at all about the expert's opinion being on an ultimate fact. But the essence of the testimony of the expert in a case such as this would be that the cause of the injuries to the plaintiff was the failure to use seat belts. Is this not testimony running to an ultimate fact?

i. The ultimate fact rule was rejected years ago in Kentucky and in other jurisdictions for several reasons: (1) It is very difficult to determine what is an ultimate fact for purposes of the rule; (2) it leads to inconsistent decisions; and (3) it distracts the court from more important considerations concerning the admissibility of opinion evidence.

ii. The important thing to understand, as you try to follow the decisions of our appeals courts and deal with this area of the law at trial, is that there will be instances in which opinion evidence on ultimate

facts will be found admissible. The cause of injuries (or death in a wrongful death action or in a homicide case) is just one illustration.

D. Kennedy v. Hageman, 704 S.W.2d 656 (Ky.App. 1986): The plaintiff stopped his truck alongside a highway after striking a deer. The defendant subsequently came along while the plaintiff was trying to load the deer carcass into his truck. The plaintiff's vehicle was struck by the defendant's car, causing injuries to the plaintiff. At trial a state trooper who had investigated the accident was allowed to testify that he had listed improper parking of the plaintiff's vehicle as a factor contributing to the accident. Objection was made to this testimony and overruled.

1. The Court of Appeals ruled that the evidence was equivalent to an expression of opinion that the plaintiff's negligence had caused the accident. The Court said that witnesses may not usurp the function of the jury, which is another way of describing the ultimate fact rule.

2. The ruling on this evidence was sound. It should not have been admitted. How would one explain such a decision without the ultimate fact rule? In most jurisdictions and under the Federal Rules the test for opinion evidence is aid to the trier of fact. The testimony in this instance would not aid the jury for a simple reason: The witness could describe the location of the plaintiff's truck in relationship to the road and could describe other pertinent circumstances at the scene; the jury could draw the inference concerning the cause of the accident as easily and as accurately as the witness did.

E. Psychological Profiles and Opinion Evidence: The following cases present additional difficulty in trying to understand the scope of expert opinion in Kentucky:

1. Pendleton v. Commonwealth, 685 S.W.2d 549 (Ky. 1985): In this case the defendant was convicted of rape and sodomy of a 6 year old victim. At trial he offered testimony from a psychologist that his psychological profile was not consistent with the profile of a sex offender; he also wanted to have the expert testify as to the probability of the defendant having committed the act. The testimony was excluded, a ruling affirmed by the Supreme Court on this ground: "An opinion as to whether the accused had the ability or propensity to commit such an act is improper because it is an opinion on the ultimate fact, that is, innocence or guilt. Consequently, it invades the proper province of the jury." Id. at 553.

2. Onwan v. Commonwealth, 728 S.W.2d 536 (Ky.App. 1987): In this child abuse case, a social worker was allowed to testify at trial that the alleged victim of the crime was upset when interviewed by the witness after the alleged act

and that her behavior was consistent with that of a sexually abused child. The Court of Appeals concluded that this testimony did not "go to the ultimate issue of innocence or guilt", that the social worker was qualified to testify as she did, and that the testimony was admissible.

i. If there is a difference between the testimony in these two cases, it is a very fine difference indeed. In both instances the expert is trying to use what is known about the behavior of a category of people for an inference that an alleged act by a specific individual did or did not occur.

ii. It is extremely difficult to see how the testimony in the first case can be characterized as ultimate fact testimony while that in the latter case is not.

iii. Once again the "ultimate fact" rule serves to distract the courts from other considerations which ought to determine admissibility of opinion testimony. Is there a scientific basis for the conclusions drawn by the experts? Is there undue speculation in their testimony? Could the jurors just as easily draw the necessary inferences to get to the ultimate conclusion? And, of course, would the testimony assist the triers of fact? A more cohesive body of opinion law would result from consideration of these questions than has resulted from use of the ultimate fact doctrine.

VI. Husband-Wife Privileges:

A. Introduction: The law has long had two separate privileges which affect the admissibility of testimony of one spouse when offered against the other. One of the privileges allows a spouse to refuse to give any testimony at all against the other; this is commonly called the "adverse testimony privilege". (In some jurisdictions this privilege may be invoked not only by the spouse-witness but also by the spouse-party). The other privilege is one that protects against the testimonial disclosure of private communications between spouses during marriage; this one is commonly called the "confidential communications privilege".

1. The scope of protection from these privileges has been on the decline since the Supreme Court of the United States decided in 1980 that the adverse testimony privilege under federal law could not be invoked by a party-spouse against a witness-spouse who desired to testify. Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906 (1980). In so ruling the Court reasoned that in this situation (where a spouse was willing to voluntarily testify against the other) the marriage had so deteriorated that loss of relevant evidence by application of the privilege could not be justified.

2. In recent cases there has been consideration of the extent to which the privileges should be applied when there exists a marriage in form but not substance. The cases described below are representative.

B. United States v. Fulk, 816 F.2d 1202 (7th Cir. 1987): In this case, the spouses were permanently separated at the time of a communication between them. By the time of trial the marriage had been terminated. The husband invoked the confidential communications privilege in an attempt to exclude testimony about the communication with his former wife. The trial court ruled the testimony admissible and the Court of Appeals affirmed.

1. This case is different from the Trammel case on an important point; the earlier case involved the "adverse testimony privilege" while this one involves the "confidential communication privilege". The significance of this is that the Court in Fulk could not rely on the deteriorating marriage argument because of the fact that the communications privilege clearly survives the termination of the marriage.

2. The Court nevertheless found the testimony unprotected. It ruled that the privilege in question has always required a valid marriage as a prerequisite to protecting the communications and that when the spouses are permanently separated at the time of the communication there is no protection of their communications.

C. United States v. Byrd, 750 F.2d 585 (7th Cir. 1984): The situation in this case was much like that involved in the prior case. There was a confidential communication between spouses while they were married but in a state of permanent separation. At trial one spouse was a voluntary witness against the other, meaning that the only possible protection available to the party-spouse was under the confidential communications privilege; the adverse testimony privilege had been rendered unavailable by the Trammel decision. An objection by the party-spouse to the testimony about the confidential communication between him and his spouse was overruled at trial. In affirming this ruling the Court of Appeals made two important decisions.

1. An argument was made in this case by the appellee that the confidential communication privilege should have no application whenever one spouse is ready to testify against the other as to communications made in a deteriorated marriage. This argument was based upon the reasoning used in Trammel to limit the adverse testimony privilege to the unwilling party-spouse, namely, that a marriage which had so deteriorated that one was willing to testify against the other was not worth saving at the cost of important evidence.

i. The Court rejected this argument and ruled that the mere fact that one spouse was willing to reveal communications made by the other was not reason to reject the expected protection of the confidential communications privilege.

ii. One of the reasons it gave was a fear of getting into a difficult problem of determining when a marriage had so deteriorated that communications should no longer be regarded as confidential.

2. The Court ruled, however, that the communication privilege did not apply in this situation because the spouses were permanently separated at the time of the communication: "[O]nly communications that take place during a valid marriage between couples still cohabiting pursuant to that marriage are protected by the privilege.

D. In re Witness Before Grand Jury, 791 F.2d 234 (2d Cir. 1986): In this case a spouse was called before a grand jury and asked questions about her husband. She refused to answer any questions and upon advice of counsel invoked both the adverse testimony and the confidential communications privilege. A motion was made to compel her to testify. At a hearing on this motion it was determined that she had been married for 23 years but had not lived with her husband for the most recent 11 years. The trial court nonetheless denied the motion to compel her to testify. The Court of Appeals reversed.

1. The Court held that the adverse testimony privilege should not be available even to an unwilling spouse-witness unless there is a valid marriage to be protected by denying access to relevant information. Because the spouses had been separated for 11 years, there was no such valid marriage and the adverse testimony privilege could not be invoked. This is an extention of the Trammel decision on the basis of the reasoning of that case that deteriorated marriages are not worth protecting at the cost of important evidence.

2. In construing the confidential communications branch of the privilege, the trial court had ruled that the privilege would be denied on the basis of permanent separation only if the separation was confirmed by a judicial decree; the court reasoned that a contrary rule would create a difficult issue of determining the existence of permanent separation. The Court of Appeals disagreed and ruled otherwise: "We believe that a court may rely primarily on the duration of the couple's estrangement, which is the guiding factor in determining 'permanent separation' and which is usually clear from the record." Id. at 238.

VII. Impeachment of Witnesses:

A. Drugs and Alcohol Use: The social problem of drug and alcohol abuse seems to have presented an increasing temptation for lawyers to try to impeach witnesses by showing evidence of drug or alcohol use. The decisions on admissibility have been very restrictive so far. The following cases are representative:

1. United States v. Cameron, 814 F.2d 403 (7th Cir. 1987): In this case an attempt was made to impeach a witness by showing that he had made extensive use of the drug LSD. The argument for admissibility was that individuals who use illegal drugs are engaged in a lifestyle of disrespect for law and are likely to have no compunction about lying under oath. The evidence was found inadmissible.

i. This type of impeachment looks a lot like character evidence. There is a settled form for impeaching witnesses by character evidence and this would not be in conformity with the rules.

ii. The Court said that evidence that a witness has used illegal drugs may be probative of the witness' possible inability to recollect and relate and may be admissible if offered for that purpose if the memory or mental capacity of the witness is legitimately at issue. That was not the case here.

2. United States v. DiPaolo, 804 F.2d 225 (2d Cir. 1986): In this case an attempt was made to impeach a witness by showing that she had had a drinking problem for two years. The trial court ruled that she could not be impeached solely on the basis of having a drinking problem. The Court of Appeals affirmed and stated what seems to be the prevailing quidelines.

i. A general trait of intemperance tells nothing about the witness's testimonial incapacity and will usually not be admissible.

ii. It is proper, however, to show that a witness was under the influence of drugs or alcohol at the time of observation of events being litigated or at the time the witness is testifying.

3. Choi v. United States Immigration and Naturalization Service, 798 F.2d 1189 (8th Cir. 1986): The witness in this case was on a drug at the time of giving his testimony. The opponent attempted to call a pharmacist to impeach the witness by introducing evidence that the drug in question created a state of euphoria which could break down inhibitions. The pharmacist had no opinion as to whether or not a person on this drug would have inhibitions against lying. The trial court ruled the evidence inadmissible. The Court of Appeals affirmed.

i. The Court stated the guidelines set out above concerning the admissibility of this type of impeachment evidence.

ii. It concluded, however, that application of these guidelines gives the trial court discretion which will not be overturned in the absence of abuse. There was no abuse in this situation.

B. Mental Illness of Witness: The admissibility of evidence of a witness's prior mental illness was considered by the Supreme Court of Kentucky in the case of Commonwealth v. Huber, 711 S.W.2d 490 (Ky. 1986). The witness in this case had been diagnosed as manic-depressive and had been hospitalized on three occasions for treatment. The trial judge ruled the testimony of this prior illness inadmissible. The Court of Appeals reversed. The Supreme Court reinstated the ruling of the trial court.

1. The Court established a rule which is very much like the one used with respect to drugs and alcohol abuse: "The prior mental treatment of a witness is not relevant as to credibility of that witness unless it can be demonstrated that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified about." Id. at 491.

2. The Court also indicated that the trial court will have discretion in administering this rule and that reversal will be appropriate only upon a showing of abuse of the exercise of that discretion.

ETHICAL AND EVIDENTIARY PROBLEMS IN THE ATTORNEY CLIENT RELATIONSHIP

By

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Section B

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ETHICAL AND EVIDENTIARY PROBLEMS IN THE ATTORNEY CLIENT RELATIONSHIP

WHEN A LAWYER WINDS UP WITH THE SMOKING GUN (OR DOCUMENT)

A) THE ATTORNEY CLIENT PRIVILEGE

1) For the privilege to be applicable, the attorney must be acting as an attorney, not as a delivery boy. Hughes v. Meade, 453 S.W.2d 538 (Ky. 1970).

2) The privilege is not applicable to the physical object itself. Thus the attorney cannot refuse, on the basis of the attorney client privilege, to comply with a subpoena duces tecum. In re January 1976 Grand Jury (Genson), 534 F.2d 719, 729 (7th Cir. 1976).

3) The privilege is applicable to questions about the source of the item, if the client gave the item to the attorney. State v. Olwell, 594 P.2d 681, 685 (Wash. 1964).

a) There should be no mention before a petit jury of the fact that the incriminating item was obtained from defense counsel. Olwell, Commonwealth v. Stenhach, 514 A.2d 114 (Pa. 1986), People v. Nash, 313 N.W.2d 307 (Mich. 1981). This protects the attorney client privilege and the client's privilege against self-incrimination, which is implicated when the act of production would authenticate the item. Fisher v. United States, 425 U.S. 391 (1976), United States v. Doe, 465 U.S. 605 (1984); State v. Superior Court, 625 P.2d 316 (Ariz. 1981).

b) The privilege is applicable to questions about the location of the item, if the attorney discovered the item as a result of information supplied by the client. People v. Meredith, 631 P.2d 46, 52 (Cal. 1981); People v. Belge, 376 N.Y.S.2d 771 (App.Div. 1975).

c) If the attorney moves the item, or otherwise interferes with the ability of the state to find it, the attorney-client privilege as to location may be waived. People v. Meredith, 631 P.2d 46 (Cal. 1981).

4) The privilege is not applicable if the item is received from someone other than the client. Hitch v. Pima County Superior Court, 708 P.2d 72 (Ariz. 1985); Morrell v. State, 575 P.2d 1200 (Alaska 1978).

B) WHAT IS THE LAWYER'S ETHICAL DUTY WITH RESPECT TO THE ITEM?

1) The Code and Model Rules appear to require lawyers to keep the client's secret unless there are statutes or court rules requiring disclosure.

a) DR 4-101(A) requires lawyers to keep confidences and secrets of the client. A secret is defined as information acquired in the course of the attorney client relationship that the client has requested be held confidential or would be embarassing or detrimental to the client if disclosed. MR 1.6 requires lawyers to keep confidential all information relating to representation of the client.

b) DR 4-101(C) says that a lawyer may reveal confidences or secrets when permitted under disciplinary rules or required by law. There is no counterpart in MR 1.6.

c) DR 7-102(A)(4) says that a lawyer shall not conceal that which he is required by law to reveal; DR 7-109(A) says that a lawyer shall not suppress any evidence that he or his client has a legal obligation to produce. MR 3.4(a) says that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document having potential evidentiary value.

2) Some courts impose an ethical duty to turn over incriminating evidence to the state even though no statute so requires

a) General duty to turn over the items after inspection. State v. Olwell, 394 P.2d 681, 684-5 (Wash. 1964); Morrell v. State, 575 P.2d 1200, 1210 (Alaska 1978); People v. Superior Court, 41 Crim.L.Rptr. 2198, 2199 (Cal.App. 5/22/87).

b) Duty to turn items over to the state if the lawyer reasonably believes that the item will be altered or destroyed if returned to the source. Commonwealth v. Stenhach, 514 A.2d 114, 123 (Pa. 1986); Hitch v. Pima County Superior Court, 708 P.2d 72, 78 (Ariz. 1985).

3) Criminal Justice Standards (proposed by the Ethics Committee of the Criminal Justice Section and reported at 29 Crim.L.Rptr. 2465 (1981)

a) A lawyer who receives incriminating physical evidence shall disclose the location of the evidence or deliver it to law enforcement authorities only if: 1) required by law or court order; or 2) the item is contraband or if the item cannot be retained in a way that does not pose an unreasonable risk of harm to someone.

b) Unless required to disclose, the lawyer shall return the item to the source from whom the lawyer received it. The lawyer shall advise the source of the legal consequences pertaining to possession or destruction of the item.

c) A lawyer may receive an item for a period of time during which he a) intends to return it to the owner; b) reasonably fears that return of the item will result in its destruction; c) reasonably fears that return of the item to the source will result in physical harm to anyone; d) intends to test, examine, inspect or use the item as part of the client's representation; or e) the item cannot be returned to the source.

d) If the lawyer discloses the location of the item or delivers it to law enforcement authorities (or to a third person) he shall protect the client's interest as best he can.

Hitch v. Pima County Superior Court, 708 P.2d 72 (Ariz. 1985) misreads these standards, which it purports to adopt, by saying that the standards permit disclosure when the lawyer fears that the evidence may be destroyed if returned to the source.

4) Professor Lefstein's Advice (Evidence in Attorneys Hands, 64 N.Car.L.Rev. 897 (1986) (addenda to the CJS Standards)

a) Do not ever search for or take possession of physical evidence unless there is a genuine belief that the evidence may be helpful to the client;

b) If you return the evidence to the source, require that person to sign a form acknowledging that he has been advised not to alter or destroy the evidence;

c) Keep evidence in your law office so as not to impede law enforcement efforts to obtain it by means of a search warrant;

d) Do not be a party to an anonymous return of evidence;

Note that Lefstein and the CJS would require a lawyer to retain evidence which cannot be returned to the source, for fear of destruction or because the source is unwilling to take the item back. Holding evidence in a law office may cause anxiety, since respected authorities such as Geoffery Hazard speak about a lawyer's duty to disclose evidence to the prosecution. Law of Lawyering, 1.6. It may be prudent to obtain an opinion of the Ethics Committee in such a case.

C) LEGAL REQUIREMENTS

1) Contraband and stolen property must be turned over to the police or returned to the rightful owner. In re Grand Jury (Genson), 534 F.2d 519 (7th Cir. 1976); In re Ryder, 263 F.Supp. 360 (E.D.Va. 1967), aff'd, 381 F.2d 713 (4th Cir. 1967).

2) KRS 524.130: Tampering with physical evidence. Class D felony which requires the state to prove: a) that the lawyer destroyed, altered or removed physical evidence; b) which he believed was about to be produced or used in a judicial proceeding; c) with intent to impair its verity or availability.

3) Civil Rule 34.

4) Court order or local rule.

CLIENT PERJURY

A) PREVENTION

1) A lawyer cannot introduce testimony the lawyer knows to be false and the client should be so informed. Lefstein, The Criminal Defendant who Proposes Perjury, 6 Hofstra L.Rev. 665, 688 (1978).

2) If the lawyer reasonably believes the client's story is false, the lawyer may move to withdraw, though he is not required to do so. DR 2-110(C)(2), MR 1.16(b)(1).

3) If the lawyer knows the client intends to testify falsely, the lawyer must advise the client against such testimony and inform him of the consequences, including the lawyer's duty of disclosure to the tribunal. ABA Formal Opinion 87-353.

4) What does a lawyer "know" the client intends to commit perjury? DR 7-102(A)(4) and (7), MR 1.2(d), Nix v. Whiteside, 106 S.Ct. 988 (1986). The Model Rules define "know" as "actual knowledge which may be inferred from the circumstances." A lawyer should decide that he "knows" the client is lying when: a) he believes the client is lying; and b) the facts (including the client's statements) are sufficient to support this belief beyond a reasonable doubt. Rieger, Client Perjury, 70 Minn.L.Rev. 121, 149 (1985). A lawyer should not conclude that he "knows" a client is lying on the basis of conjecture or a slight change in the client's story. Nix v. Whiteside, 106 S.Ct. at 1007 (Stevens concurring).

5) Ordinarily, a lawyer should assume that the client will heed the warning described in para. 3 and testify truthfully. ABA 87-353. In the rare case of an insistent perjurer, the attorney should next move to withdraw on the ground that he cannot competently represent the client because of a serious disagreement concerning the presentation of evidence. DR 2-110(B), MR 1.16(a). If questioned, the lawyer should tell the judge that he believes the client intends to testify falsely. ABA 87-353, modifying ABA Informal 1314.

6) If the court denies the motion to withdraw, the attorney may attempt to restrict his questioning of the client to matters on which the client will testify truthfully. ABA 87-353.

7) As a last resort, the lawyer may attempt to prevent the client from testifying. ABA 87-353, United States v. Henkel, 799 F.2d 369 (7th Cir. 1986). There is no Constitutional right to commit perjury. This approach appears problematic, however, because the client's story would not have been judged perjurious.

8) A lawyer should carefully document his files in any case in which a client is "persuaded" not to testify. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977).

REMEDIAL MEASURES

1) If perjury occurs, the lawyer should first remonstrate with the client to correct the matter. MR 3.3, Comment 11.

2) If the client will not correct the matter, the lawyer must notify the court, in camera if possible, of his belief that perjury occurred (ABA 87-353 and MR 3.3(b)) and be prepared to "prove" this contention if required to do so by the court. Client Perjury at 149.

3) The attorney client privilege. The privilege protects the client's statements about past criminal conduct, but does not protect communications between lawyer and client where the client's purpose is to further a crime or fraud. McCormick, 3d ed., p.229. The crime fraud exception may not coincide exactly with the ethical duty to disclose.

SUBPOENAS TO ATTORNEYS

JUSTICE DEPARTMENT GUIDELINES (sec. 9-2.161(a) of the U.S. Attorney's Manual, reprinted in 37 Crim.L.Rptr. 2480 (1985)).

1) All reasonable efforts shall be made to obtain information from alternative sources before issuing a subpoena to a lawyer for information relating to the representation of a client, unless such efforts would compromise an investigation.

2) All reasonable efforts shall be made to voluntarily obtain information from an attorney before issuing a subpoena unless such efforts would compromise an investigation.

3) Approval of the Assistant Attorney General of the Criminal Division is required.

4) In a criminal case, there must be reasonable grounds to believe that a crime has been committed and the information sought is reasonably needed. The subpoena must not be used to obtain peripheral or speculative information.

5) In a civil case there must be reasonable grounds to believe the information sought is reasonably necessary to the completion of the litigation.

6) The reasonable need for the information must outweigh the potential adverse effects on the attorney client relationship.

7) Subpoenas shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonably limited period of time.

8) The information sought shall not be privileged.

If a subpoenaed lawyer finds it necessary to file a motion to quash, these guidelines should be asserted for the proposition that the court, in the exercize of its discretion, should require the opponent to make a showing of need and hardship.

THE ATTORNEY CLIENT AND WORK PRODUCT PRIVILEGES

1) The attorney client privilege does not protect:

a) The identity of the client, except in the rare case in which the client intended his identity to be confidential and in which the client's anonymity is relevant to a bona fide attorney client relationship. In re Grand Jury Subpoena (Doe), 781 F.2d 238, 241 (2d Cir. 1985); Hughes v. Meade, 453 S.W.2d 538 (Ky. 1970); United States v. Hirsch, 40 Crim.L.Rptr. 2125 (9th Cir. 10/27/86), modifying Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

b) Fee information. In re Grand Jury Subpoena (Doe), 781 F.2d 238 (2d Cir. 1985); in re Shargel, 742 F.2d 61 (2d Cir. 1984).

c) Statements made in furtherance of a crime or fraud.

2) The work product privilege is applicable in both criminal and civil cases. United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160 (1975). Wolfram at p. 295 says, "The protection precludes discovery through grand jury questioning, through subpoena or other coercive process or through attempted questioning at trial."

PROBLEMS IN JURY SELECTION: DEMONSTRATING AND EVALUATING THE METHODS

By

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PRINCIPLES OF VOIR DIRE EXAMINATION

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INTRODUCTION

We all know trying a case is a matter of personality and style. What is effective for one lawyer may not be comfortable for another. Even though personality and execution differ, many trial lawyers agree on several basic principles that can make a good voir dire examination. Today, I am going to suggest to you some of those principles.

PRINCIPLES OF VOIR DIRE EXAMINATION

[1] Put Yourself in the Jurors' Shoes. They have been served by the sheriff with a summons and forced into a court against their will. The jurors are not familiar with the courtroom ritual and do not know what to expect. They are uncomfortable. It is sort of like church, but you do not know what will happen next. They are ordered around by the judge and bailiff and usually forced to wait. Then to add insult to injury, they are asked to speak publicy about

personal matters. Jurors often feel they are being cross-examined by lawyers during voir dire. They are afraid of revealing their feelings in public. They are afraid of appearing stupid. They are afraid of being rejected. Psychologists say that jurors suffer from "situational anxiety."

There are several consequences of all this fear. First, the jury may see you as the enemy because you add to their anxiety with all your questions. Second, the jurors are not going to openly and freely tell you their innermost personal feelings about the issues. In a National Jury Project survey, 71% of the jurors surveyed before trial admitted feeling prejudice against the defense in a criminal case before the trial started, but only 15% of the jurors admitted any prejudice during voir dire. Andrews, Mind Control in the Courtroom, Psychology Today, March 1982, p. 70.

[2] **Quit Thinking Like a Lawyer**. The jurors are not lawyers. They have not been trained to think like lawyers. These non-lawyers are going to decide your case. These folks are going to apply their own ideas, feelings and experiences to your case. Most studies show that the average juror listens and understands on about an eighth-grade level. Most importantly, jurors are determined to follow their own feelings to reach a fair and just verdict.

How do you deal with this situation? It's simple. You stop being a lawyer and start being a human being. Never use a legal term. [If you break this rule, consider defining the term clearly for the jury]. You talk simply. You talk clearly. You show warmth, concern,

and compassion for the jurors. You use the "Double-H" principle. Be humble, be human. You adopt a style of voir dire that is more conversational [i.e., coffee shop but structured] than it is cross-examination.

Finally and most importantly, you had better like and trust the jury and the jury system. If you do not, they are not going to like you or trust you. For example, turn the situation around and ask yourself, "Who can influence and persuade me the most?" Of course, it is a friend that you like and trust. How did you get to be friends with this person? Was it because you liked and trusted the person and they returned those feelings? This is non-verbal communication, and it begins with a feeling, an instinct. A lawyer who likes and trusts juries is off to a flying start at getting the jury to like and trust him. If he can get this start, the channels of communication are open for persuasion.

[3] Start Voir Dire by Dealing with Jurors' Feelings of Anxiety. Begin voir dire in a relaxed conversational [i.e., coffee shop but structured] tone of voice. If you are relaxed and confident because you are well prepared, this will help the jury to relax through what is known as mood transference [i.e., compare your mood at the scene of the accident with your mood at a yoga lesson]. You are always communicating with the jury on a conscious and an unconscious level. You must be aware of the unconscious communication.

Help the jury to relax by dealing with their situational anxiety, tell them what to expect. Consider this opening:

Good morning and welcome to the courtroom. I know some of you have never served on a jury before, so, before I begin, I will tell you a little about what to expect. As you know, this part of the trial is jury selection. It is my job to ask you some questions about this case. For example, I'll ask questions like, "Do you know any of the parties in the case?" "Do you know any of the witnesses?" Do you know any of the lawyers?" I will ask about your feelings and your attitudes concerning certain rules of law and certain facts involved in this particular case. These questions are asked in order to find out if there is something in your experiences in life or your feelings about the issues in this case that would make it difficult for you to serve as a juror. It is a way for each of us to get to know one another before the trial begins.

[4] Get the Jury Involved in Understanding Why You Are Asking Questions. Step three let the jury know that you cared about their feelings, but you have not gone far in neutralizing the situational anxiety that exists. To validate your questioning, you might follow one of these ideas:

a/ Pick an alert, better educated juror and ask:

Q. Mr. Jones, if you were a party to this case, would you want a person who was a close relative of the other party to serve as a juror?

A. No, sir.

Q. Would you think it was fair for a close relative of your opponent to serve as a juror?

A. No, sir.

Q. So, you can understand why it is my job to ask some questions of the jury before the trial begins, can't you?

A. Yes, sir.

Q. Thank you, sir. Now, does everyone on the jury understand why it is my job to ask these

questions? If so, please raise your hand. [Counsel raises his hand] [If the jurors raise their hands, you are on your way to a decent voir dire. You have just asked them to move physically, and they did. That means the process of persuasion has already begun]

b/ Q. Now, ladies and gentlemen, please assume that instead of jurors this morning, you are seated at counsel table with an attorney, and you are a party to this case, either the plaintiff [person who brought the suit] or the defendant [person against whom the suit was brought]. Would you want the opposing party's close relative on the jury? If your answer is no, you would not want the opposing party's close relative on the jury, please raise your hand. [Counsel raises his hand]

Q. All of you would agree that it would not be fair for an opposing party's brother, for example, to sit on the jury, would you not? If your answer is yes, please raise your hand. [Counsel raises his hand]

Q. Now, do all of you understand that it is my job at this point of the trial to ask you some questions about your relationship to the parties and about your experiences and attitudes in life? If you understand that responsibility on my part, please raise your hand. [Counsel raises his hand]

[If someone is reluctant to raise his hand, in your friendliest voice, ask, "Mrs. Jones, I couldn't tell if you agreed with my last statement. Could you tell me, please?"]

[5] Get the Jury Talking Quickly. The importance of this principle cannot be overstated. One of the loneliest feelings I know is standing in a crowded courtroom asking jurors questions and getting nothing in return but the "silent treatment." Many voir dire examinations end at this point with little or no answers. If this happens, you have received no information and, worse, the jury has been reluc-

tant to respond to you. Still worse, the jury may have formed a pattern of resisting you and your presentation. Still worse, you may not want to go to work for your uncle in a coal mine. So, what do you do? Try this:

> Ladies and gentlemen, as you were being called and seated in the jury box, I tried to keep up with where each of you were seated. I have a chart with each block being one chair. [Holding up the chart for them] I would like to double check the chart's accuracy by asking each of you to stand and tell us your name and where you live. Let's start with the first juror called and proceed in the same order in which the clerk called your names. [After the response, "Thank you, sir," or "Thank you, ma'am." Maintain eye contact while thanking the jurors].

Another technique is to begin voir dire with a question to which the jury is most likely to respond. For example: [1] Do you drive a car? [2] Have you ever been in an automobile wreck? [3] Have you ever served on a jury? [4] How many of you served in the United States Armed Forces?

[6] <u>Show an Interest in the Jurors' Answers</u>. When a juror is speaking, you must show respect and interest in the person by maintaining eye contact. After the answer is complete, be ready to do one of two things. Either thank the juror for his answer, or be ready with a follow-up question <u>using the juror's words</u>. This is a subtle form of flattery, and it lets the juror know that you are listening carefully. Always reinforce the jurors' responses by acknowledging them.

When people have good rapport with one another, they will frequently mimic one another's body movements, rhythm of speech, and

tone of voice. This phenomenon is called neurolinguistic programming [NLP] or sometimes pacing. A lawyer working hard during voir dire examination might naturally emulate a juror's body movements, voice and rhythm of speech. By moving like the juror with your hands and developing the juror's rhythm of speech, you will learn how the juror is feeling. However, this must be done naturally. It will not work as a technique. A better understanding of this form of communication can be found in Smith and Malandro, Courtroom Communication Strategies, (Kluwer, 1985) -- [to order, call (212) 382-2855 and ask for Customer Service]. In my view, this book represents a great breakthrough in studying communication principles in the courtroom.

[7] Do Not Ask a Question which May Offend Any Juror. The best rule to follow here is what we call the "barbecue rule." We have a lot of barbecues in Western Kentucky, and they are great social events. Do not ask any question you would not ask someone you just met at a barbecue. For example, do not say, "Hi, my name is Tom, how much money do you make?"

Other areas where embarrassment is likely include questions relating to whether one's spouse works outside of the home and prior litigation experience. For example, do not ask, "Does your wife work?" Also, do not ask about a juror's prior litigation experience if you do not feel it is absolutely necessary to inquire about divorce matters.

A corollary to this principle is progression. Try to organize your questions so that the least personal questions are asked

first and the more personal questions are asked later in the conversation. This is consistent with the way a natural conversation progresses when two people meet.

Never use the words "biased" or "prejudiced." These words have a bad connotation. Simply design questions to get the information you want in an indirect way.

Always pronounce a juror's name correctly. If you are unsure, ask. In the case of a lady juror, you might ask, "Do you prefer to be called Ms. or Miss" or in an appropriate case, "Ms. or Mrs.?"

[8] Have Your Questions Written Verbatim. You should never read the questions, but writing them forces you to think precisely how you want to ask each question. Writing your questions also serves another function. It builds confidence and allows you to relax.

You know the jury will probably respond to certain questions. You can keep the jury interested and involved by arranging those questions at intervals throughout the voir dire presentation.

[9] Avoid Boredom! We live in a fast-moving society. People are accustomed to being entertained. Rarely do people sit and do nothing. If you begin voir dire by asking the first juror the following questions:

Q. What is your name?

Q. Where do you live?

Q. Are you married?

Q. Do you have any children?

Q. Where do you work? Etc.

then you move to the next juror:

Q. What is your name?

Q. Where do you live?

Q. Are you married?

Q. Do you have any children?

Q. Where do you work? Etc.

what will the jury feel? They are going to feel bored. They will feel as though they will be there all day. They will begin to feel frustration, and even worse, they will blame you. You can never allow this to happen.

In order to avoid this problem, consider mixing the questions that you ask the panel with the questions that you ask individual jurors. You might also consider asking some individual questions and jumping around from juror to juror. For example: "Juror No. 1, where do you live?" "Juror No. 6, have you ever been in a wreck?" "Juror No. 7, have you ever served as a juror?" [Of course, you would never refer to a juror by number]. In this way, the jurors are expecting to be asked a question at any time, and they are anticipating they may be asked the next question.

[10] **Watch and Listen How a Juror Answers as Much as What Is Said.** Body language is intuitive. You do not have to read a book on it. If a person is sitting with his arms and legs crossed and has a frown on his face, you know he is not happy. This is not a difficult science. Our unconscious minds pick up this information all the

time. If you want a book on the subject, the most frequently cited book is Fast, Body Language, (Pocket Books, 1970). You can find this book in most any bookstore.

Personally, I have found that eye contact is a very telling bit of body language. The more a juror looks at me, the better the rapport with that juror. During voir dire, I am constantly trying to measure the degree of rapport I have with each particular juror. Also, the tone of voice and facial expressions are usually more revealing than what the juror says.

[11] **Questions Should Show Fairness.** Draft your questions to show you want a fair jury. This builds your credibility and allows the jury to trust in you. For example, consider:

> Q. Mr. Jones, I understand you have made a claim for personal injury benefits before. What is your feeling about personal injury claims?
>
> A. Well, I think they are sometimes proper.
>
> Q. Was that claim resolved to your satisfaction?
>
> A. Yes, sir.
>
> Q. Was it a jury trial?
>
> A. Oh, no.
>
> Q. I take it you could be a fair juror to both my client [use your client's name, of course] and to the defendant in this case?
>
> A. Yes, sir.

[12] **You Must Get the Jury Committed on Key Issues.** You simply must identify the key issue or issues in your case. Then you must design a question or questions which will be asked each juror

individually to get a clear, public commitment on this issue. Once the juror has made his public commitment, he or she is far more likely to act in conformity with that commitment. For example, if you are asked at a bar assocation meeting to serve on a committee and you announce openly that you will serve, you then feel committed to attend the meeting of that committee. It is just good psychology.

Let's suppose that you have a case in which large money damages are sought. Consider these questions:

[TO THE PANEL]

Q. Ladies and gentlemen, the Court will instruct you that should you find for the plaintiff [use plaintiff's name], in this case, you will have to award fair and reasonable compensation for his injuries. Do all of you feel you can do this? If so, please raise your hand. [Counsel raises his hand] [Turning to the court reporter and saying, "All jurors raised their hands." If you have not already briefly explained the role of the court reporter in the trial, you should do so].

Q. If you find for the plaintiff [use plaintiff's name], you will have to consider three areas of damages. First, you must consider past and future medical expenses. We expect the evidence in this case to show that our client's past medical expenses are now $147,000. If you find this is correct based upon the evidence, will you award that amount? If so, please raise your hand. [Counsel raises his hand]

Q. If you find for the plaintiff [use plaintiff's name] and the evidence shows that his future medical expenses for the rest of his natural life will exceed $750,000, and you believe this is correct based upon the evidence, will you award this amount? If so, please raise your hand. [Counsel raises his hand]

Q. If you find for the plaintiff [use plaintiff's name], and you are convinced by the evidence that he can never work again and he could have earned the minimum wage over his work life expectancy of some 45 years, and those damages are in the amount of $328,500, will you award that amount? If so, please raise your hand. [Counsel raises his hand]

Q. If you find for the plaintiff [use plaintiff's name], and you are convinced by the evidence that he has lost the ability to enjoy his life and that he will be permanently confined to a hospital bed and/or wheelchair, will you award a sum of money which will reasonably compensate him for this mental and physical suffering? If so, please raise your hand. [Counsel raises his hand]

Q. One final question on this point, when you add all of the damages, the amount of money may be very large. Mr. Jones, if you find this total amount is a substantial sum, but it is fair and reasonable under the evidence, will you award this amount even though it is a substantial sum? [Ask this of each juror individually]

Q. Is there anyone on the panel who would be reluctant to award a substantial verdict in this case simply because it is a large sum of money? [Again, turn to the court reporter and state that no hands were raised]

[13] Changing an Attitude. In response to a question about damages, suppose a juror says, "I think there are too many lawyers, too many lawsuits, and jury awards are way too much. Things just seem to be getting out of hand." Consider saying, "Thank you, Mr. Jones, for your candor. Does anyone else on the panel agree with Mr. Jones' statement?" Two more jurors raise their hands. Give these jurors a chance to speak also. Then say, "I agree with all three of you. I sometimes read about the craziest cases in the newspaper. So, I want to ask you this question:

Q. Do any of the three of you feel it is the plaintiff's [use plaintiff's name] fault that there are too many lawyers?

A. No.

Q. Do any of you feel it is the plaintiff's [use plaintiff's name] fault that there are too many lawsuits?

A. No.

Q. Do any of you feel that it is the plaintiff's [use plaintiff's name] fault that some juries seem to return large awards where they are not justified?

A. No.

Q. Now, even though you have these general feelings about lawyers, lawsuits and awards, if you were convinced by the end of this case that my client [use plaintiff's name] was entitled to a substantial verdict under the law and evidence, would you still make that award? [Ask each individual]"

[14] Humanize Your Client and Involve the Jury in His Plight. Maybe this is the most important single principle of voir dire. The jury must be impressed that this is not just another case. It is the only case and the only chance for your client. Never refer to "my client." Always use his or her name. Show concern for your client by your questions. Touch your client. Feel your client's problems. Let that feeling enter into all of your questions. That concern and compassion for your client is the heart and soul of a personal injury case.

The client is a unique human being, and the jury must be made to view the client as such, not just a statistic without spirit or per-

sonality. The jury should feel that it is as integral a part of the case as the client. The jurors will have to render a verdict in a conflict in which they are not involved, with people they do not know. They have been taken from their businesses, and their lives are disrupted. How are they involved in this? You must involve them. You must convey to the jury that your client, much like each of them, suffers from disillusionment, self-doubt, melancholy, and embarrassment. You must humanize your client and make him more than just another plaintiff. This is accomplished with your attitude and formulation of all voir dire questions.

[15] Challenge for Cause. These are precious because you have so few peremptory challenges. Set them up slowly one small step at a time. Consider the juror who knows the defendant and speaks to him when he sees him on the street.

Q. Mr. Jones, you are on friendly terms with Mr. Defendant, are you not?

A. Yes, sir.

Q. You have talked with Mr. Defendant from time to time, have you not?

A. Yes, sir.

Q. You would not want to do anything to hurt Mr. Defendant, would you?

A. No, sir.

Q. Don't you think you would be more comfortable sitting on a case that did not involve one of your friends?

A. Yes, sir.

Q. And if you were forced to sit on a case involving one of your friends, even though you tried to be fair, you might, either consciously or unconsciously, tend to favor your friend, isn't that correct?

[16] Catch Phrases. Later, in opening statement and closing argument, you will have planned catch phrases to use. They will be designed to stick in the jurors' minds. Consider using such phrases during voir dire. For example, in a product liability case, you may want to repeat "unreasonably dangerous product" several times to focus the jury's attention on this concept. In the case of a product that explodes, you may want to tell the jury it exploded "like a bomb." In a medical malpractice case, you may want to tell the jury that the defendant is a good doctor who was only negligent on this one occasion, that is, "he ran a medical stop sign." The list of these catch phrases is endless, but you should not overlook the opportunity to use them during voir dire examination.

[17] Ask Your Opponent's Questions. The plaintiff gets an opportunity to voir dire first. He has the opportunity to take over and to become the master of ceremonies, so to speak. He can be the leader for the jury and the source of most information. You may consider asking defense questions such as:

Q. Do you feel the plaintiff [use plaintiff's name] is entitled to a verdict solely because he filed a suit?

Q. We will not ask you for a verdict until we have proven that the defendant was negligent and we are entitled to recover compensation.

Q. We do not ask for your sympathy. We have had that. Sympathy is like charity, it is not deserved. Do you understand that we will only ask you for a verdict after we have proven the defendant is liable based upon the evidence?

[18] Admit Your Weak Points. Absolutely nothing can destroy your credibility more than allowing the defendant to effectively exploit your weakness. Condition the jury to your weak points, such as a plaintiff who has a prior conviction:

Q. Ladies and gentlemen, my client, Mr. Smith, was run over by the defendant's car at an intersection. That is what this case is about. Mr. Smith will take the stand and tell you about the incident. When he does, he will also tell you that when he was 18 years old, he got into trouble, and he was convicted of burglary. Will that fact effect your ability to decide this case?

You do not care what the answer is. The important fact is that you have admitted the problem. You have saved your credibility. Also, you have given the jury a small dose of the problem as a vaccine to condition them later. If the defendant shouts during cross-examination, "Isn't it true you are a convicted thief," it is not going to destroy your case. The jury may well feel, "What's the big deal? We already know about that."

[19] Late in Voir Dire Examination, Consider a Series of Several "Yes" Questions. The psychology here is to allow the jury to feel emotionally and unconsciously that they are in agreement with you and your side of the case. For example, you might ask the following questions of the panel:

Q. Do you feel the jury system is a fair method for resolving disputes?

Q. Do you feel that an injured person has a right to recover for pain and suffering?

Q. Do you think that it is alright for injured people to seek money damages?

Q. Do you think you will be able to follow the law as the judge gives it to you?

Q. If you see the evidence as supporting the plaintiff, can you follow that evidence and return a verdict for the plaintiff?

Q. If you hear evidence from the plaintiff's expert that the plaintiff has suffered a serious injury, can you return a commensurate dollar award?

Q. Can you be fair to both lawyers and to both parties in deciding this case?

[20] When You Finish Jury Selection, Have a Closing Prepared. If nothing else, a clear and sincere "thank you" is adequate, but your closing should signal to the jury that you have done what you set out to do. You are in control. You are confident. You are a professional.

STATEMENT OF FACTS

David Lineberry Case

Seven-year-old David Lineberry sustained permanent brain damage in a car wreck on June 4, 1987. David and four of his friends were being taken to the local high school to participate in a basketball camp at the time of the wreck. David had been picked up by one of his classmate's father, Glenn Dunnigan. Glenn allowed the boys to ride in the bed of Glenn's new Ford Ranger pickup truck.

As they were traveling to the local high school, an elderly lady, Marie Hunter, ran a stop sign and hit the truck in the side. As a result of the impact, the truck rolled over several times, and three of the boys received severe injuries. The other two boys sustained less serious injuries. The owner and driver of the pickup truck, Glenn Dunnigan, was not significantly injured in the wreck.

David Lineberry is still in an intensive care unit at the Frazier Children's Hospital in Louisville, Kentucky. He is completely paralyzed from the waist down. He has no control over the function of his arms. Sometimes his arms move in a spastic motion. David's level of consciousness varies. In his most alert and conscious state, David will open his eyes, scream, cry, and lapse back into a complete coma. He is unable to speak or communicate in any way with his family. His physicians feel that in his most alert state, his screaming and crying is produced by an awareness of his physical condition.

Assume this action has been filed in the local circuit court against three defendants: [1] Marie Hunter for negligence in running a stop sign; [2] Glenn Dunnigan for negligence in allowing the boys to ride in the bed of the pickup truck; and [3] Ford Motor Company for failure to warn the public of the increased risk of severe injury to people riding in the bed of the truck.

From these facts, it is clear the jury will be required to answer several questions. Put in their simplest form, they are as follow:

[1] Did Marie Hunter fail to exercise ordinary care for the safety of other persons in the operation of her car, and was such failure a substantial factor in causing David Lineberry's injuries?

Yes_____ No_____

[2] Did Glenn Dunnigan fail to exercise ordinary care for the safety of other persons in the operation of his truck, and was such failure a substantial factor in causing David Lineberry's injuries?

Yes_____ No_____

[3] If you are satisfied from the evidence that in the exercise of ordinary care, Ford Motor Company should have anticipated a substantial likelihood that persons would ride in the bed of Ford pick-up trucks and that such conduct is unreasonably dangerous, then it was the duty of Ford Motor Company to provide such users, including David Lineberry and Glenn Dunnigan, with a reasonable warning of the danger. Do you find from the evidence that Ford Motor Company had such a duty?

Yes_____ No_____

[4] If you find two or more of the defendants at fault, you will determine from the evidence and state what percentage of total fault was attributable to each defendant. In determining percentages of fault, you shall consider both the nature of the conduct of each defendant at fault and the extent of the causal relationship between the conduct and damages claimed.

Marie Hunter: _____%

Glenn Dunnigan: _____%

Ford Motor Company: _____%

TOTAL: 100 %

[You may put 0% in any blank where you found a defendant was not at fault in questions 1, 2, or 3.]

[5] If you find for David Lineberry, you will determine from the evidence and award him a sum or sums of money that will fairly and reasonably compensate him for the following damages as you believe from the evidence he has sustained directly by reason of the conduct of the defendants:

[a] Reasonable expenses incurred for hospital and medical services, medicines and medical supplies: $_____
[Not to exceed $147,000]

[b] Reasonable expenses incurred for hospital and medical services, medicines and medical supplies that he will probably incur in the future: $_____
[Not to exceed $750,000]

[c] Permanent impairment of his power to earn money: $_____
[Not to exceed $328,500]

[d] Mental aned physical suffering, including any such suffering he will probably endure in the future: $_____
[Not to exceed $1,000,000]

TOTAL: $_____
[Not to exceed $2,225,500]

VOIR DIRE

David Lineberry Case

Good morning. I represent David Lineberry. David is seven years old. Little David was severely brain damaged in a car wreck. As you can see, David is not with me here today. He is not able to be here. David is in the intensive care unit at The Frazier Children's Hospital in Louisville, Kentucky.

I brought this case for David. You may hear David referred to as the plaintiff. That simply means the person who brought the suit. The other parties in the suit you will hear referred to as defendants. That means they are the parties against whom the suit has been brought. The defendants are Ford Motor Company, Glenn Dunnigan and Marie Hunter.

On June 4, 1987, David and four of his second grade classmates were on their way to basketball camp at Marshall County High School. They were being taken to the camp by one of the boy's father, Glenn Dunnigan. Mr. Dunnigan had allowed the boys to ride in the bed of his new 1987 Ford Ranger pickup truck.

Mr. Dunnigan was traveling south on Kentucky Highway 95 toward the intersection of Kentucky Highway 1422. Mrs. Hunter was traveling on Kentucky Highway 1422 toward the same intersection. Mr. Dunnigan had the right-of-way. Mrs. Hunter had to stop. Mrs. Hunter failed to see the stop sign, ran into the intersection, and hit the side of Mr. Dunnigan's truck.

The truck rolled over causing severe injuries to David Lineberry. I brought this claim for David against three parties: First and foremost, Ford Motor Company, for failing to warn the public that riding in the bed of its trucks increased the risk of severe physical injury ten times more than riding in the cab of the truck with the seatbelt fastened; second, Glenn Dunnigan, for allowing the boys to ride in the bed of the truck; and third, Marie Hunter, for running the stop sign.

As you know, this part of the trial is jury selection. At this time, it is my job to ask you some questions on David's behalf. The questions will concern your knowledge of the parties, experiences with cases such as this, experiences with the legal profession, and your feelings about some of the legal issues and facts in this case. The questions I am going to ask are designed to learn if there is something in your personal experiences or your personal attitudes that might make it difficult for you to serve as a juror in this particular case.

Q. Do each of you understand why it is my job to ask you these questions during the jury selection process?

Q. Has any member of the panel ever owned a pickup truck?

Q. Has any member of the panel ever driven a pickup truck?

Q. Has any member of the panel ever ridden in the bed of a pickup truck?

Q. Has any member of the panel ever allowed other persons to ride in the bed of a pickup truck which he was operating?

Q. Are you aware that the National Safety Council has reported that a person riding in the bed of a pickup truck is ten times more likely to suffer severe physical injury than a person riding in the cab with his seatbelt fastened?

Q. Were any of you aware of the National Safety Council report which I just mentioned?

Q. If you had been aware of the National Safety Council report and the risks involved, would you have allowed persons to ride in the bed of a pickup truck which you were operating?

Q. Have any of you ever purchased a product that had a warning on it?

Q. Do you generally try to follow the warnings on products you purchase?

Q. After reading a warning on a product, are you more careful in using that product?

Q. Have any of you ever been injured by a dangerous or defective product?

Q. Have any of you ever considered filing a product liability action?

Q. Have any of you ever represented a plaintiff in a product liability action?

Q. Have any of you ever represented a defendant in a product liability action?

Q. Have any of you ever written articles concerning product liability cases?

Q. Do you believe a manufacturer should place warnings on dangerous products?

Q. Do you know any of the parties in this case: David Lineberry, Glenn Dunnigan or Marie Hunter?

Q. Have any of you ever worked for Ford Motor Company?

Q. Have any of you ever performed legal services for Ford Motor Company or any other automobile manufacturer?

Q. Have you or any member of your family or close friends ever worked for any automobile manufacturer?

Q. Have any of you ever owned stock in Ford Motor Company?

Q. Have any of you ever owned shares of a mutual fund that may have held stock in Ford Motor Company?

Q. Have any of you ever served as jurors in a case before?

Q. Have any of you ever been a party to a lawsuit other than a divorce?

Q. Have any of you ever testified in a jury trial as a witness?

Q. Have any of you ever represented a plaintiff in a personal injury case?

Q. Have any of you ever represented a defendant in a personal injury case?

Q. Have you or any member of your family ever been involved in an automobile wreck?

Q. Have you or any member of your family ever made a claim for personal injury benefits even though it did not result in a lawsuit?

Q. Have you ever been employed in any job which required you to adjust and settle claims?

Q. Are any of you members of the Defense Research Institute?

Q. Are any of you members of any legal organization which is designed to advance education and training regarding the defense of lawsuits?

Q. Earlier, I told you I would ask you about some of your feelings. One of the things I would

like to ask is how you feel about Ralph Nader and his work as a lawyer?

Q. How do you feel about product liability cases in general?

Q. How do you feel about awarding money for pain and suffering?

Q. Do you think there should be caps on pain and suffering awards?

Q. Have you read recently about the lawsuit crisis?

Q. Do you believe there is a liability lawsuit crisis in America?

Q. Where have you read about this crisis?

Q. Do you read Time Magazine or Newsweek?

Q. Have you read any of the advertisements about the so-called lawsuit crisis in Time Magazine or Newsweek?

[By this point, someone has mentioned insurance, so, I can go ahead with the subject.]

Q. Do you feel that insurance companies in America are justified in increasing premiums as a result of large jury verdicts?

Q. If you find for the plaintiff, David Lineberry, in this case and you are convinced that he has incurred $147,000 in medical expenses from the date of the wreck until the date of trial, will you award that sum as damages?

Q. Will you be hesitant to award that sum because it is a large amount of money?

Q. If you find for the plaintiff, David Lineberry, in this case and you are convinced that throughout his lifetime he is going to require care and treatment which will cost his family a

total sum of $750,000, will you award that sum for future medical expenses?

Q. If you find for the plaintiff, David Lineberry, in this case and you are convinced that he is totally and completely disabled as a result of this wreck, will you award him a fair sum for the destruction of his power to earn money?

Q. If you find from the evidence that the minimum award you could make for David Lineberry's destruction of earning capacity is the minimum wage of $3.65 per hour multiplied by 45 years of work life expectancy is $328,500, will you make an award for that amount?

Q. Assume you find for the plaintiff, David Lineberry, in this case, do you understand you will be required to determine an appropriate sum which will fairly and reasonably compensate him for the loss of his enjoyment of life and the mental and physical pain and suffering that he will endure in the future?

Q. Do you think that you, as a juror, can arrive at a sum of money which will fairly and reasonably compensate David Lineberry for this loss?

Q. Assume you find for the plaintiff, David Lineberry, in this case and you are convinced that David Lineberry will never substantially improve from his condition as it exists today, do you think you could be fair to both David Lineberry and to Ford Motor Company in arriving at an appropriate damage figure?

Q. Can you conceive any case where the pain and suffering damages should be in the sum of $1,000,000 or more?

Q. Do you realize that there is nothing that will compensate David Lineberry in any way for his condition and what has been done to him other than money?

Q. Do you realize that money may allow David Lineberry, if he improves to the point of getting into a wheelchair, to be able possibly to travel, to take advantage of new medical technology which

may develop in the future, and to maybe even salvage for himself some small measure of enjoyment out of life?

Q. Now I want to ask you some questions about apportionment of liability. If you find one or more defendants at fault, it will be your job to determine the extent to which their individual fault caused David Lineberry's injuries. For example, if you find against two defendants, do you understand that you will be required to assign a percentage for each defendant, totaling 100%?

Q. Do you understand that the only negligence we will prove in this case against the defendant, Marie Hunter, is her failure to see a stop sign?

Q. Do you understand that simply is an accident?

Q. Have any of you ever accidentally ran a stop sign?

Q. On the other hand, do you understand the decision of Ford Motor Company not to place a warning on this truck was an intentional act?

Q. Do you, generally, assign more blame to a person for committing an intentional act as opposed to an accidental act?

Q. Do any of you have a severely injured or severely handicapped person in your family?

Q. Do any of you have a close friend who is severely injured or severely handicapped?

Q. Do any of you know of any reason why you could not sit in this case as a juror and be completely fair to both David Lineberry and to Ford Motor Company and the other defendants?

THANK YOU, GENTLEMEN.

POSTSCRIPT

This voir dire was written to fit into a 20-minute seminar program. Since the inidividual defendants in this case had limited insurance coverage, I felt there were three key issues that must be dealt with during voir dire examination:

[1] **Will the Juror Find Ford Motor Company Liable?** The voir dire attempted to focus immediately upon Ford, taking advantage of the psychological principle of primacy. Questions were structured to make Ford appear to be "at fault."

[2] **Will the Juror Award Substantial Damages?** These issues were dealt with in greater detail than many judges would allow. [How often do you have three law school professors on a jury panel?]

[3] **Will the Juror Apportion Heavily Against Ford?** I closed the voir dire with a preview of my argument as to why Ford is more responsible than Marie Hunter who simply ran a stop sign. She was guilty of a simple accident which anyone can understand. On the other hand, Ford was guilty of an intentional failure to warn.

RULE 11 UPDATE

Richard H. Underwood
Associate Professor of Law
University of Kentucky College of Law
Lexington, Kentucky

Section D

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RULE 11 UPDATE

Richard H. Underwood
Associate Professor of Law
University of Kentucky

"... as a deterrant to ill-founded prosecution, a law was made imposing on any accuser, who failed to win one fifth of the votes, a fine of 1000 drachmae or, in a civil case, of one-sixth of the sum in dispute."

C. Robinson, A History of Greece 272 (9th ed. 1957)(commentary on ancient Athenian law courts).

" ... I think Rule 11 is a useful weapon against unnecessary litigation, and most judges think that too."

Arthur Miller

"It's become another way of harrassing the opponent and delaying the case .... To date, the effects have been adverse."

Judge Jack Weinstein

I. THE RULE

A. Text:

> **Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.**
>
> **[Amended effective August 1, 1983.]**

B. Deviation from the traditional ethic?

> A code that deals primarily with the lawyer's conduct in relation to the client can be called a loyalty code .... A code of ethics that addresses both [dealings with the client, and others on behalf of the , client] can be called an integrity code [like Rule 11]. L. Ray Patterson, An Inquiry Into The Nature Of Legal Ethics, 1 Georgetown J. Legal Ethics 47 (1987)

C. Components

1. Objective versus subjective
2. Well grounded in fact
3. Duty with respect to law
4. Not for any improper purpose
5. Motion for fees and expenses
6. Procedure
7. Appropriate sanction

II. THE VIEW FROM MOUNT OLYMPUS

The following comments from the federal bench are worth studying.

A. Schwarzer, Sanctions under the New Federal Rule 11 - A Closer Look, 104 F.R.D. 181, 184-5 (1985):

> That the threat of sanctions for misuse or abuse may tend somewhat to inhibit attorneys is not equivalent to chilling vigorous advocacy. Rule 11 in substance requires the signing lawyer or party to certify that on the basis of a reasonable prefiling inquiry he is informed and believes that the paper has a factual and legal basis and that it is not interposed for delay. A lawyer may therefore be called on to explain the basis or purpose of a paper. But vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyer will live with the rules that govern the system. Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice system to represent his client and, in doing so, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper functioning of that system.
>
> II
>
> A. The Substance of the Amended Rule
>
> The 1983 amendment made significant changes in Rule 11, the most important of which may be summarized as follows:
>
> (1) The rule now applies to every paper filed in court, not only pleadings; and it applies to persons appearing *pro se* as well as to attorneys and parties.
>
> (2) It mandates reasonable prefiling inquiry with respect to the facts and the law on which a paper is based.
>
> (3) It specifies that papers filed must be well grounded in fact and warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law.
>
> (4) It further specifies that papers may not be interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (5) It directs the court to impose on counsel or the client sanctions, including reasonable expenses which may include reasonable attorney's fees, for violation of the rule.[16]

In approaching the analysis of Rule 11, three overriding principles should be kept in mind:

(1) The rule provides for sanctions, not fee shifting. It is aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party. The key to invoking Rule 11, therefore, is the nature of the conduct of counsel and the parties, not the outcome.

(2) At the same time, however, the rule, although derived from precedents resting on bad faith, is not so limited. The Advisory Committee Notes specifically refer to the fact that the "reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted."

(3) Finally the rule reaches not only frivolous proceedings but also those which, although not without merit, constitute an abuse of legal process because brought for an improper purpose such as causing harassment, unnecessary delay or needless increase in the cost of litigation. As the Advisory Committee Notes state, the rule "should discourage dilatory or abusive tactics and help * * * streamline the litigation process."

B. The Requirement of Certification

The rule operates by giving effect to the signature of the attorney or party on a pleading, motion or other paper.[17] If the party is represented, the signature must be that of an attorney, not a firm, who is one of the attorneys of record for the party. This signature certifies that the paper conforms to the requirements of the rule.

The person signing the paper may not necessarily be the one responsible for it. An associate in a law firm charged with preparing a paper for filing may be carrying out the instructions of a partner who made the decision to file it. In such a situation, sanctions are more appropriately imposed on the principal rather than the agent carrying out his orders, and nothing in the rule bars its application in that manner.

A similar problem may arise when a paper is signed and filed by local counsel at the direction of out-of-state counsel. Local counsel may be called on to share in the preparation of a paper and in the decision to file it. On the other hand, a client may find it more economical to place responsibility on an out-of-state firm which will use local counsel only as a conduit for papers and communications. Rule 11 is not intended to increase the cost of litigation by requiring review of papers by an additional set of lawyers. What the rule does require is that the lawyer who elects to sign a paper take responsibility for it, even if that responsibility is shared. Where control of the litigation rests with other lawyers, therefore, local counsel may be well advised to let one of those lawyers sign papers to be filed.

Even if the paper is signed by out-of-state counsel, however, the presence of the name of local counsel or his firm on the paper raises an inference that he has authorized or at least concurred in its filing. It would be difficult for a lawyer to disclaim all responsibility for a paper bearing his name.[18] Rule 11 may therefore make it advisable for attorneys acting as local counsel to consider the extent to which they can perform the role of a passive conduit consistent with the responsibilities the rule imposes.

The relationship between lawyers on one side of a case may create problems for the court as well. If the purposes of the rule are to be served, sanctions proceedings should be directed at the lawyer responsible for the offending paper. The court should therefore identify the responsible lawyer before such proceedings begin. Where several lawyers are involved, fairness may require an inquiry to determine their relative culpability. Such an inquiry creates a risk of generating satellite proceedings and divisiveness among the lawyers and should therefore be undertaken only in a rare case and, if possible, not until the end of the case.

B. Whittington v. The Ohio River Co., __ F.Supp. __ (E.D. Ky. 1987).

Although much frivolous litigation is undoubtedly being curtailed by the amended rule, its use is chilling vigorous advocacy, and the time saved by deterring frivolous litigation tends to be offset in hearing Rule 11 motions. Further, excessive use of the rule is contrary to the liberal pleading philosophy that is the cornerstone of the Federal Rules of Civil Procedure, which contemplate development of the plaintiff's original allegations by discovery. This court cautions that the application of Rule 11 has been overdone and some retrenchment is in order. The bar must become familiar with Rule 11 and what it requires, and it has been too slow in doing so. This opinion is an effort to provide concrete guidelines to the bar and thus make the rule fairer and more efficient in achieving its laudable purposes.

A synthesis of the legislative history, commentary, and cases reveals the following Rule 11 principles: (1) An attorney must read every paper before signing it. (2) He must make a reasonable pre-filing investigation of the facts. The cost of determining whether a defendant should be named must be borne by the plaintiff and his attorney before the suit is filed; the burden cannot be shifted to a defendant to prove himself out of the case after filing. The attorney's file should contain facts admissible in evidence, or indicating the probable existence of evidence, implicating that defendant or supporting that claim. (3) He must research the law, unless he is certain he knows it. The court advises all attorneys to make sure that the file contains at least a skeleton memo outlining concretely the legal basis for every claim or defense. (4) The law as applied to the facts must reasonably warrant the legal positions and steps he takes. If existing law does not warrant these positions, a plausible argument for the extension of the law to the facts of the case is required. (5) It must be demonstrated, as the basis of pre-filing investigation and research, that there is a reasonable basis to name each defendant named, and to support each claim asserted. The shotgun complaint or answer, filed in the hope that discovery will produce the justification for it, is improper. (6) The adequacy of an attorney's investigation, research, and legal analysis will be evaluated by an objective standard: whether the attorney acted as a reasonably competent attorney admitted to federal practice. Except as to improper purpose, subjective good faith is not a defense to Rule 11 sanctions. (7) The attorney must continually reevaluate his positions and abandon them if they are no longer reasonably warranted. (8) An attorney must not have an improper purpose, such as harassment or intimidation, in naming any defendant, asserting any legal position, or taking any legal step. Even meritorious litigation positions, if taken for improper purposes, can violate Rule 11. (9) If an attorney violates Rule 11, the imposition of some sanction is mandatory, although its nature and extent is discretionary with the district court.

III. RULE 11's COMPONENTS

A. Objective versus subjective

1. Before the amendments were actually adopted, one fool observed that the new culpability standard should be read as a subjective standard with an objective element. So read, it would ordinarily apply to reckless conduct. The author proposed its adoption as an alternative to the problematical countersuit. Underwood, Curbing Litigation Abuses (etc.), 56 St. John's L. Rev. 625 (1982).

2. While this view proved consistent with many early applications of the new rule, the cases have tended to shift to a wholly objective standard (for the purpose of ascertaining violations).

3. Cases: Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986); Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985).

4. Related developments: Haynie v. Ross Gear Division of TRW, Inc., 799 F.2d 237 (1986) (28 U.S.C. 1927 applied pursuant to objective standard), vacated after stipulation of mootness by USSCt. 1987); Hill v. Norfolk and Western Railway Co. __ F.2d ___ (7th Cir. 3/16/87)(Appellate Rule 38 incorporates objective standard).

B. Well grounded in fact

1. Van Berkel v. Fox Farm and Road Machinery, 581 F.Supp. 1248 (D. Minn. (1984)(Client told lawyer injury on Sept. 6, 1977, when in fact Sept 6, 1976. Client's medical records would have shown truth. Comment: I thought the statute was an affirmative defense.)

2. Unioil, Inc. v. E.F. Hutton & Co., Inc., 802 F.2d 1080 (9th Cir. 1986) (Lawyer for class of plaintiffs had never talked to representative plaintiff and had relied on referring counsel to find one. He had also never worked with referring counsel before, and asked no questions. Whopping sanction. Comment: the opinion has been withdrawn pending review en banc).

3. It may make a difference if the opponent controls relevant information and is non-cooperative. Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986)(1983 claims involving allegations, later withdrawn, that commissioner and city improperly trained and supervised individual defendants. Training records could not be obtained before suit.) But compare Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986)(information needed was in plaintiff's medical records, specifically the names of pharmaceutical companies connected with plaintiff.

C. Duty with respect to law

1. Lawyers have an ethical responsibility to their clients to know the applicable law. Rule 11 extends this obligation to the court and opposing party. In some sense this is not a new obligation. What may (or may not) be new is the application of an objective standard.

2. "District courts have held that the signer's inquiry is not reasonable if the law is discoverable by using the resources available to him or her. For example, failure to use basic legal research tools, such as citators, digests, and annotated codes may not constitute reasonable inquiry. Similarly, failure to conduct a computerized search, if available to the signer, may not be reasonable inquiry." Litigant Responsibility 392 (cited in the NEW ARTICLES section).

3. The prevailing view is that the duty to research will be governed under an objective standard. See Zaldivar and Eastway.

4. Would a reasonably competent lawyer believe that the pleading, motion, or other paper is supported by the law?

If the answer is no, the second question that must be asked is whether the lawyer is attempting in good faith to extend, modify, or reverse the law. Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1985)

5. Some courts seem to apply an objective test even when they get to the second question. See Zaldiva.

6. Many courts would like to zap counsel who misrepresents the law, or fails to disclose adverse authorities. Other courts have resisted the use of Rule 11 for this purpose. Golden Eagle Distributing Corp. v. Burroughs Corporation, 801 F.2d 1531 (9th Cir. 1986). Compare Jorgenson v. County of Volusia, 625 F.Supp. 1543 (M.D. Fla. 1986)(which relied on the lower court opinion in Golden Eagle).

D. Not for any improper purpose

1. This is referred to as the motivational prong. See Litigant Responsibility at 390. Once again it is stricter than than the traditional ethic. As Judge Schwarzer observes:

> In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney's subjective intent. The record in the case and all of the surrounding circumstances should afford an adequate basis for determining whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the cost of litigation that was needless, or whether they lacked any apparent legitimate purpose. Findings on these points would suffice to support an inference of an improper purpose. The court can make such findings guided by its experience in litigation, its knowledge of the standards of the bar of the court, and its familiarity with the case before it, and by reference to the relevant criteria under the Federal Rules such as those in Rule 1 and Rule 26(b)(1).[51]

If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate. In the absence of such a showing to justify what appears to be a prima facie unreasonable paper, sanctions may be appropriate.

Improper purpose may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake. For example, sanctions were imposed when plaintiff persisted in prosecuting claims after they had been rejected by the court of appeals,[54] when plaintiff insisted on relinquishment by defendant of certain rights as a condition to abandoning a frivolous claim,[55] and when plaintiff in addition to persisting with a baseless claim failed to attend sessions on time, failed to adhere to stipulations, made a frivolous motion for reargument, and moved to transfer the action on the eve of the hearing on defendant's motion to dismiss which had been pending two months.[56]

2. Of course, this is not really a problem because a well-founded complaint is always filed with an objectively proper purpose? Zaldivar

3. What is an improper purpose? Filing a pleading to gain time? Chevron USA, Inc. v. Hand, 763 F.2d 1184 (10th Cir. 1985). Excessive persistence or obdurate resistance, as Judge Schwarzer opines?

E. Motion for fees and expenses

1. Presumably the moving party must present accurate time records. Cf. Hensley v. Eckerhart, 461 U.S. 424 (1983); Kelley v. Metropolitan County Board of Education, 773 F.2d 677, 683-84 (6th Cir. 1985).

2. Duty to mitigate. Schwarzer at 203. See also, INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., __ F.2d __ (6th Cir. 3/31/87).

3. The fee awarded may be less that the "lodestar" (time billed times hourly rate) Eastway Construction Co. v. City of New York, __ F.2d __ (2d Cir. 6/8/87).

4. A fee request can be so unreasonable as to be frivolous? Eastway in lower court, 637 F. Supp. 558, 575 (E.D.N.Y 1986).

5. Not every sanctions motion should be filed. See comments of Arthur Miller at 101 F.R.D. 161, 200 (1983) (discussing bizarre instances of frivolous sanction motions).

F. Procedure

1. The en banc 11th Circuit recently overruled an earlier decision by one of its panels to set guidelines regarding due process and Rule 11 sanctions. The following excerpt is from Vol. 3, No. 12, of the ABA/BNA Lawyer's Manual on Professional Conduct, at 199-200:

> ***Digest of Opinion:*** **While a divorce action was pending against his client, the lawyer filed suit under 42 USC 1983, alleging that various defendants conspired unlawfully to expedite the divorce proceedings and terminate the client's marriage. The defendants filed motions to dismiss and for an award of attorneys' fees. The hearing on the motion to dismiss shifted to the question whether there was any factual basis for the allegations in the complaint. The court asked the client, her counsel, and counsel's law partners to submit personal financial statements for use if the court decided to impose sanctions under Rule 11. Subsequently, the court treated the motion to dismiss as a motion for summary judgment, granted judgment for the defendants, and ordered that the lawyer pay a $1,000 fine and the defendants' attorneys' fees and expenses.**
>
> **A panel of this court correctly reversed the granting of summary judgment. The panel also held, however, that Rule 11 proceedings are similar to criminal contempt proceedings and must adhere to Fed.R.Crim.P. 42(b). This court, voting en banc, disagrees and holds that the procedural due process rights of lawyers and clients who may be subject to sanctions under Rule 11 do not require the trial court to adhere in every instance to Rule 42(b).**
>
> **The major goals of Rule 11 are to rid the courts of meritless litigation and to reduce the growing cost and burdensomeness of civil litigation. It would be counterproductive if the rule itself were to cause an increase in unnecessary litigation by mandating extensive collateral procedures as prerequisites to the imposition of sanctions.**

Due process requires notice and an opportunity to be heard before any governmental deprivation of a property interest. There is no fixed rule to govern Rule 11 cases. The standard must be flexible to cover varying situations. The rule itself constitutes a form of notice to the lawyer that he has a responsibility to conduct a reasonable inquiry into the viability of a pleading before it is signed. On the other hand, questions of whether an attorney made a good faith argument under the law or whether he interposed a pleading for an improper purpose are more ambiguous and may require more specific notice of the reasons for contemplating sanctions. If sanctions are proposed to be imposed on a client, due process demands more specific notice. In either event, early notice of the possibility of Rule 11 sanctions should be given to the lawyer or client — either by the court, the party seeking sanctions, or both — to deter continuing violations, thereby saving monetary and judicial resources.

The accused must be given an opportunity to respond, orally or in writing as may be appropriate, to the invocation of Rule 11 and to justify his actions. The rule does not require a hearing separate from trial or other pretrial hearings. Whether an additional hearing is necessary depends on the nature of the case, including the type and severity of the sanction under consideration. Further hearings may be unnecessary, for example, when an attorney has failed to present factual support for claims despite several opportunities to do so, whereas an issue of credibility or the validity of a legal argument may make additional hearings desirable.

The imposition of sanctions in this case is reversed along with the granting of summary judgment. The district court should wait until the motion for summary judgment is properly considered before deciding, under the foregoing guidelines, whether sanctions are appropriate and what they should be. — Godbold. J.

Concurrence: The court's guide to Rule 11 is valuable, but has no place in this action because the complaint filed by the lawyer here is almost a carbon copy of an action previously authorized by this court. — Hill, J.

Concurrence: If the Rule 11 sanction assumes the criminal character of a fine, as where it is grossly disproportionate to the lawyer's misconduct, additional due process safeguards paralleling those in Rule 42(b) are necessary. — Johnson, Tjoflat, Kravitch, and Hatchett, JJ.

(Donaldson v. Clark, No. 85-8270; CA11 (en banc), 6/24/87; vacating 786 F2d 1570, 2 Law. Man.Prof.Conduct 150)

2. Generally, the courts have recognized that a fair hearing is required if essential facts are in dispute. Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986)(plaintiff's counsel unaware that photo's and tapes in hands of police showed plaintiff lying about arrest); Matter of Yagman, 796 F.2d 1165 (1184 (9th Cir. 1986)(careful scrutiny of fee request, as well as claim of hardship by party opposing fee award); Thornton v. Wahl, 787 F.2d 1151 (7th Cir. 1986)(who should pay ... lawyer or client); Textor v. Board of Regents, 711 F.2d 1387 (7th Cir. 1983) (issue of existence of bad faith/aggravating circumstances relevant to penalty).

3. When the complaint is "legally" unsound the court may dispense with a hearing. McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986). Compare Hill v. N & W, supra (no hearing on Rule 38 motion when apparent from record that there are factual issues).

G. The appropriate sanction.

1. The purposes of sanctions are restitution, punishment, and deterrance. Carlucci v. Piper Aircraft Corp., 775 F.2d 1440 (11th Cir. 1985).

2. The courts must realize that they should impose the least severe sanction adequate to achieve the purpose. Schwarzer at 201.

3. The range includes private reprimand, public reprimand, part or all of costs or fees, and the fine. Referral to disciplinary counsel is also a possibility.[insert anecdote here]

4. Crippling awards are draconian, and unnecessary.

IV. NEW ISSUES

A. Is there a continuing duty to examine the facts?

1. Not under Rule 11. Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986).

2. Yes pursuant to "bad faith" rule? Nemeroff v. Abelson, 704 F.2d 652 (2d Cir. 1983). Yes pursuant to section 1927.

3. Then Rule 11 doesn't apply to removed actions? Stiefwater Real Estate, Inc. v. Hindale, 7 Fed. R. Serv. 3d 56, __ F.2d __ (2d Cir. 1987). But Kentucky has Rule 11 as amended.

B. How much of a pleading has to be bad? See Martinez v. Landau, __ F.Supp.__ (N.D.Ind. 10/23/85) (pleading should be judged as a whole)

C. Are payouts covered by insurance?

D. Is the firm liable?

1. Yes, according to Calloway v. Marvell Entertainment Group, __ F.Supp. __ (S.D.N/Y. 12/23/86)

2. If the firm is vicariously liable shouldn't it be covered even if the individual is not? Cf. Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209 (Minn. 1984).

V. IN CLOSING

> "If they disregard due proportion by giving anything what is too much for it ... the consequence is always shipwreck."
>
> Plato

This thought could be used as the battle cry of both Rule 11's advocates and detractors. Presumably neither will recognize that it is a plea for a balanced view. In any event, I think that the courts might be a bit more moderate in the application of the rule.

OTHER ARTICLES

1. Oliphant,Rule 11 Sanctions and Standards: Blunting the Judicial Sword, 12 Wm. Mitchell L. Rev. 731, 744 (1986).

2. Note, Litigant Responsibility: Federal Rule of Civil Procedure 11 and its Application, 28 B.C.L. Rev. 385, 390 (1986).

3. S. Kassin, An Emoirical Study of Rule 11 Sanctions (Federal Judicial Center 1985).

4. Note, Reasonable Inquiry under Rule 11 - Is the Stop, Look and Investigate Requirement a Litigant's Roadblock?, 18 Ind. L. Rev. 751 (1985).

5. Weiss, A Practitioner's Commentary on the Actual Use of Rule 11, 54 Fordham L. Rev. 23 (1985).

APPPENDIX

The most complete service on ethics in general and Rule 11 in particular is the ABA/BNA Lawyer's Manual on Professional Conduct. The following case digests of important cases come from that manual.

Federal appeals court may sanction lawyer under Fed.R.App.P. 38, without hearing, for making objectively groundless legal arguments.

The U.S. Court of Appeals for the Seventh Circuit finds no due process problems with its decision to impose sanctions, without a hearing, on a lawyer who filed a frivolous appeal. Rule 38 establishes an objective standard for the imposition of sanctions, the court emphasizes, so there is no need for a hearing in cases such as this one where the Rule 38 sanctions are premised on the existence of objectively groundless legal arguments in the lawyer's appellate brief.

Digest of Opinion: The plaintiff, a brakeman fired by the defendant railroad, took his firing to arbitration before a public law board, which unanimously rejected his claim that he had been fired in violation of the collective bargaining agreement between the railroad and the union. He then brought suit under 45 USC 153 First (q) to set aside the board's decision. He lost in the district court and appealed to this court.

The appeal has no merit. Indeed, it reveals a serious misunderstanding of the scope of federal

judicial review of arbitration decisions. As has been said many times, the question for decision by a federal court asked to set aside an arbitration award is not whether there was any error in interpreting the contract, but only whether or not the contract was interpreted.

There remains to be resolved the matter of sanctions. The plaintiff's lawyer wasted this court's time and his adversary's money by misrepresenting the standard of federal judicial review of arbitration decisions. Sanctions should be imposed in this case under Rule 38 for the filing of an appeal based largely on frivolous grounds. It is immaterial that the defendant did not request sanctions, since sanctions are frequently imposed on this court's own initiative.

The imposition of Rule 38 sanctions directly on counsel could be thought the imposition of a disciplinary sanction under Fed.R.App.P. 46(c), which provides for a hearing at counsel's request. A lawyer ordered to pay money as a sanction for the filing of a frivolous lawsuit or appeal is entitled to due process of law, and that entitlement includes an opportunity for a hearing if a factual question concerning the propriety of sanctions is raised. But obviously, the right to a hearing, whether that right is implicit or, as in Rule 46(c), explicit, is limited to cases in which a hearing would assist the court in its decision.

Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant conduct is laid out in the briefs themselves; neither the mental state of the lawyer nor any other factual issue is pertinent to the imposition of sanctions for such conduct. Where a hearing would be pointless, it is not required.

If there was some question as to whether the arguments were made in bad faith there would be a factual issue and the lawyer would be entitled to a hearing. The standard for the imposition of sanctions under Rule 38, however, is an objective one; it has nothing to do with the mental state of the person sanctioned.

The text of Rule 38, and this court's previous decisions applying it, provide all the notice that an attorney could reasonably demand for sanctions to be imposed on counsel directly for the making of frivolous legal arguments in this court — and imposed without a hearing if there are no factual questions. — Posner, J.

Dissent: I would find that the appeal was not frivolous, was not an undue burden upon the appellee, and was not a waste of the court's time. Even were I to consider the appeal to have been frivolous, I would not impose sanctions sua sponte without first allowing the lawyer an opportunity to respond. — Parsons, J.

(Hill v. Norfolk and Western Railroad Co., No. 86-2202; CA7, 3/16/87)

Party seeking sanctions under Fed.R. Civ.P. 11 has duty to mitigate damages and therefore will be compensated only for amounts necessarily expended in responding to frivolous pleading; procedures employed to ensure that imposition of Rule 11 sanctions complies with due process need not include hearing in cases in which offending pleading is not grounded in law or fact and judge imposing sanctions participated in proceeding in which pleading was filed.

Rule 11 sanctions may not exceed the amount that the opposing party unavoidably incurred in expenses and attorneys' fees in responding to the frivolous pleadings that triggered the rule, the U.S. Court of Appeals for the Sixth Circuit holds. This limitation prevents the party seeking the sanctions from abusing the rule by obtaining avoidable "self-imposed" expenses.

Digest of Opinion: The plaintiff filed a breach of contract action against the defendant in June 1983. Two months later, the plaintiff's counsel granted the defendant's attorney an indefinite extension of time to answer the complaint. After a 14-month delay, the defendant filed its answer and counterclaim. The plaintiff then moved to strike the defendant's answer, counterclaim, and affirmative defenses. The trial court granted the motion to strike, but before its order was entered, the defendant filed a motion to dismiss for insufficiency of service of process and for summary judgment. The defendant also filed a motion for recusal of the judge. The plaintiff responded that the motions were filed in bad faith and sought an award of costs and fees under Rule 11. The lower court ruled that sanctions under Rule 11 should be imposed personally on the defendant's counsel. The matter was referred to a magistrate who, after two days of hearings in which the attorney for the defendant's trial counsel participated, recommended sanctions of $14,238.75. The lower court adopted the recommendation.

The sanctions for the motion to dismiss and motion for recusal are affirmed. These motions were not supported in law or in fact. A remand is required, however, for a redetermination of the amount of costs and attorneys' fees awarded. Rule 11 allows the recovery of "reasonable expenses incurred because of the filing of the pleading, motion, or other paper." In deciding what expenses are reasonable, the court must consider the goals of the rule, which are the deterrence and punishment of offenders and the compensation of their opponents for expenditure of time and resources responding to unreasonable pleadings or motions.

"Reasonable" does not necessarily mean actual expenses. To award costs and fees under Rule 11, the court must determine if the expenses were unavoidable, or if they were self-imposed. When counsel is called upon to defend against its adversary's unreasonable motion practices, he must

mitigate damages by correlating his response, in terms of hours and funds expended, to the merit of the claims. This reduces the possibility that a fee petitioner may abuse Rule 11 to benefit from opposing counsel's errors.

The defendant's attorney received due process in the imposition of the sanctions. He was given notice of the hearing and an opportunity to explain his conduct. His own attorney cross-examined plaintiff's attorneys regarding their costs and fees charged, and he submitted numerous documents in support of his position.

Although the assessment of sanctions under Rule 11 must comport with due process, the necessary procedures will depend on the circumstances. An attorney facing sanctions under Rule 11 is not always entitled to a hearing. No hearing is required when an attorney is sanctioned for filing frivolous motions ungrounded in law or fact, and where the judge imposing sanctions has participated in the underlying proceedings. Thus, the attorney in this case received more than the minimum due process protection. — Todd, J.
(INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc. (In re Garratt), No. 85-1888; CA6, 3/31/87)

DISCOVERY METHODS:
USES AND ABUSES

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1) Broad scope of discovery - Rule 26.02; "any matter not privileged which is relevant to the subject matter involved in the pending action...not grounds for objection that the information sought will be inadmissible if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

2) Objections are often made for tactical reasons of doubtful propriety.

b. Evidentiary Depositions - a substitute for oral testimony.

1) Under what circumstances may a deposition be used in lieu of oral testimony?

a) some equity cases - alimony and divorce, foreclosure, judicial sale, accounting, settlement of estates; and other equity cases if the court so orders after due

regard to the importance of demeanor evidence. CR 43.04(1).

b) witnesses who are exempted from the duty to present their testimony in court. This list is found in CR 32.01(c) and includes persons more than 100 miles from the court, persons in the military and those who are prevented from attending court by virtue of illness, infirmity or imprisonment. The list also includes "occupational exemptions", notably bank tellers, lawyers, dentists and physicians.

c) by agreement of counsel.

2) Objections as to form are waived unless made at the time of taking - CR 32.04(3)

(b).

3) Objections as to substance (matters of competency and relevancy) are not waived unless the ground for the objection is one that might have been obviated if the objection had been made at the taking. CR 32.04(3)(a). Example of substantive ground which might have been obviated on timely objection - qualification of physician to give an expert opinion.

a) if the case is to be submitted on depositions (equity cases - CR 43.04) the substantive objection must be made at the time of taking or in writing prior to submission.

b) stipulations that objections are reserved

1. matters of substance

2. matters of form

G. Content of the Deposition

1. Rules

a. CR 26.02 (scope of discovery)

2. Strategy Concepts

a. Chronological order

b. Who, what, where, when, why, how

H. The Corporate Designee

1. Rules

CR 30.02(5) and (6) (deposing the corporate designee)

2. Strategy Concepts

a. Detailed notice

b. Detailed request for production of documents

c. Place of taking

II. DISCOVERY OF OPPONENT'S EXPERTS

A. The method

1. CR 26.02(4)

Facts known and opinions held...acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)(i). . .interrogatories require. . .each person. . .expects to call as an expert witness at trial, to state the subject matter. . .and to state the substance of the facts and opinions. . .and a summary of the grounds for each opinion.

(ii) upon motion, the court may order further discovery by other means. . .

(b) A party may discover facts known or opinions held by an expert who has been retained by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under paragraphs (4)(a)(ii) and (4)(b) of this Rule; and (ii) with respect to discovery obtained un-

der paragraph (4)(a)(ii) of this Rule the court may require, and with respect to discovery obtained under paragraph (4)(b) of this Rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

B. The matters discoverable

1. CR 26.02(4)--The subject matter, the substance of the facts and opinions, and the grounds therefore.

a. Bender v. Eaton, 343 S.W.2d 799 (1961)--opinions contained in report from expert to lawyer who retained him not discoverable.

b. Ford Motor Co. v. Angelucci, 455 S.W.2d 528 (1970)--conclusions in an investigation report of Ford engineering to Ford lawyer are not discoverable.

c. Ford Motor Co. v. Zipper, 502 S.W.2d 75 (1973)--Both of the above cases decided prior to 1971 amendments to discovery rules and their holdings should be examined in

that context.

d. Newsome v. Lowe, Ky. App., 699 S.W.2d 748.

III RULE 11

A. Whittington v. The Ohio River Company, Judge Bertelsman's Opinion sets forth the criteria for awarding sanctions, fees and costs.

PRACTICAL CONSIDERATIONS IN COMPARATIVE FAULT REVISITED

By

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Section F

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PRACTICAL CONSIDERATIONS IN COMPARATIVE FAULT REVISITED

PEGGY E. PURDOM
WELCH & PURDOM
ASHLAND, KENTUCKY

I. RECENT KENTUCKY CASES

A. Wemyss v. Coleman Ky., 729 S.W. 2d 174 (1987).

1. Facts: Plaintiff was a passenger in a vehicle struck from the rear by defendants. The trial court granted plaintiff's Motion in Limine prohibiting defendants from presenting the deposition testimony of a physician testifying that if plaintiff had used her seat belt, she probably would not have suffered injuries necessitating medical care. Defendants appealed a verdict for plaintiff to the Court of Appeals, which affirmed the decision of the trial court to exclude evidence relating to failure to use a seat belt.

2. Holding: In an Opinion by Justice Leibson, the Kentucky Supreme Court adopted the definition of "fault" contained in Section 1 of the Uniform Comparative Fault Act (UCFA), which includes an "unreasonable failure to avoid an injury or mitigate damages." Per the official comments to the UCFA, failure to use an available seat belt can fall within this definition of "fault" and therefore serve to reduce plaintiff's recovery under comparative fault, upon presentation of competent evidence to establish that plaintiff's injuries would have been substantially less if a seat belt had been used. Thus, the trial court's refusal to permit such proof to be offered was reversible error.

3. The "seat belt defense" does not qualify as a breach of a

statutory duty which may be specifically enumerated in jury instructions. Rather, it falls within the general duty to exercise reasonable care for one's own safety.

4. The definition of "fault" in the UCFA approved by the court probably would also include other types of failures to use available safety devices which would reasonably be expected to prevent or reduce injury (i.e. a motorcycle helmet), as well as an unreasonable failure to follow medical advice or obtain appropriate medical care.

5. In a separate concurring Opinion, Justice Vance cautioned that this decision should not be construed by the Bar as an endorsement of the UCFA and as the court pointed out in Hilen v. Hays, Ky., 673 S.W.2d 713 (1984), the Kentucky Supreme Court did not and still does not express an opinion on the application of other portions of the Act, leaving all other issues to be decided upon a case by case basis.

B. Reda Pump Company v. Finck, Ky. 713 S.W.2d 818 (1986).

1. In accordance with the express provisions of the Kentucky Products Liability Act, KRS 411.320(3), plaintiff's contributory negligence is a complete defense in a products liability action, despite dictum to the contrary in Hilen v. Hays. See also Anderson v. Black & Decker, Inc., 597 F.Supp. 1298 (EDKY. 1984).

2. Definition of "a products liability action" contained in KRS 411.300(1).

C. Kennedy v. Hageman, Ky. App., 704 S.W.2d 656 (1985).

1. Held that the Doctrine of Last Clear Chance was abolished with the adoption of comparative fault, per dictum to this effect

in the Hilen Opinion. The same language from Hilen quoted with approval in Kennedy also suggests that willful or wanton negligence of a defendant can still be offset with plaintiff's simple negligence. Caveat: Similar dictum in Hilen regarding application of comparative fault to products liability actions was rejected in Reda Pump case.

II. THE UNIFORM COMPARATIVE FAULT ACT AND PROBLEM AREAS UNDER CURRENT KENTUCKY LAW

A. Defendant's gross negligence or intentional tort - will it be apportioned with plaintiff's mere contributory negligence?

1. Traditionally, contributory negligence was not a defense to "that aggravated type of negligence, approaching intent, which has been characterized as 'willful,' 'wanton,' or 'reckless'." First National Insurance Company v. Harris, Ky., 455 S.W.2d 542, seemingly overruled in Hilen v. Hays, 673 S.W.2d at 718.

2. The definition of "fault" in Section 1(b) of the UCFA adopted in Wemyss "includes acts or omissions that are in any measure negligent or reckless," so that one can surmise that any conduct by defendant short of an intentional tort can be offset by plaintiff's negligence. The official comments to the Act indicate that the court is not precluded from applying comparative negligence in cases of intentional torts, such as certain types of nuisance actions, but the Act probably would not apply in cases involving intentional infliction of personal injury.

B. Third party defendants and/or non-party defendants - are they included in the allocation of fault?

1. Nix v. Jordan, Ky., 532 S.W.2d 762 (1975). Two vehicle

accident, plaintiff passenger sues only one driver, not naming her husband, driver of the vehicle in which she was riding, as a defendant as well. Original defendant brings in the husband as a third party defendant. Although the Kentucky contribution statute (KRS 412.030) allows apportionment of fault between "joint tortfeasors", the original defendant was held responsible for the entire verdict and could recover by way of contribution against the other driver for only 50% of the amount paid to plaintiff, regardless of the respective degrees of fault between the two drivers.

Section 2(a) of the UCFA allows apportionment of fault among all tortfeasors, whether plaintiff, defendant, third party defendant, or settling tortfeasor. This portion of the Act was not expressly approved in Hilen, although later decisions speak generally of Section 2 having been adopted in its entirety (see e.g., Wemyss v. Coleman, at 178).

3. Given the widespread criticism of Nix v. Jordan, for its inherent unfairness in depriving a defendant of an allocation of fault with other joint tortfeasors, it seems logical to predict that it will be overruled and the provisions of the Act applied.

See Justice Vanoe's concurring opinion in Fireman's Fund v. Sherman, Ky., 705 S.W.2d 459, 465 (1968), and Justice Leibson's dissent at p. 466.

4. Note that the Act allows for the allocation of fault only among parties to the action. Section 2(a). However, per Carlisle Construction Company v. Floyd, Ky. App., 727 S.W.2d 867 (1986), a non-party against whom the plaintiff "has actively asserted a

claim" may be included in the allocation of fault among the parties if requested by one of the defendants. In Carlisle, plaintiff had settled with an alleged joint tortfeasor prior to filing suit.

C. Joint and several liability.

1. Problem: Plaintiff sues two joint tortfeasors and each defendant is assessed with a percentage of fault. However, one of the defendants cannot pay its portion of the judgment.

2. Per KRS 454.040 (the "apportionment" statute) and Orr v. Coleman, Ky., 455 S.W.2d 59 (1970), the verdict was "several," and each defendant paid only his share of the loss. See also Prudential Life Insurance Company v. Moody, Ky., 696 S.W.2d 503 (1985).

3. Per Section 2(c) of the UCFA, the judgment is "joint and several." If a portion of the judgment is uncollectible, Section 2(d), provides that the Court upon appropriate motion made not more than one year after judgment shall reallocate any uncollectible amount among the other parties, including the plaintiff, according to their respective percentages of fault. See illustrations in official comments to Section 2. However, the party whose liability is reallocated is still subject to contribution and continuing liability on the judgment.

D. "Immune" tortfeasors.

1. The negligent employer. Problem: Plaintiff is injured at work on an allegedly defective machine, and brings a third party action against the manufacturer. The manufacturer in turn names the employer as a third party defendant, seeking indemnity

or contribution, for an independent act of negligence by the employer, such as failure to repair or service the machine. The employer counterclaims against the manufacturer for recovery of Workers' Compensation benefits paid to the employee. Assume the employee is not negligent, his damages are $100,000.00 (pain and suffering and other non-compensation damages), and the jury allocates fault at 40% to the manufacturer and 60% against the employer. The employer settled plaintiff's comp. claim for $30,000.00.

2. Burrell v. Electric Plant Board, Ky., 676 S.W.2d 231 (1984): Manufacturer has right of indemnity against negligent employer, but employer's liability is limited to Workers' Compensation benefits paid or payable.

3. Problem presented if UCFA was applied.

a. Since plaintiff cannot recover from his employer by virtue of the employer's immunity per KRS 342.690, is the portion of the judgment allocated to the employer "uncollectible," thus allowing the employee a reallocation under the method used in the UCFA?

b. As between the manufacturer and the employer's subrogation claim for compensation benefits, is there to be a setoff per Section 3 of the UCFA?

E. Contributory negligence of children and others under a disability.

Skaggs v. Assad, Ky., 712 S.W.2d 947 (1986). The adoption of comparative negligence has not affected prior law on standards of care. In Skaggs, a ten-year-old child playing with a BB gun was

found to be contributorily negligent.

F. Punitive damages - will any award of punitive damages be offset by contributory negligence apportioned to plaintiff?

No Kentucky cases yet dealing with this issue, but the majority view, in both "pure" and "modified" comparative negligence jurisdictions is that there is no offset. See Woods, Comparative Fault, supra, at pp. 174-175.

G. Causation - the "substantial factor" test - affected by the adoption of "pure" comparative negligence?

1. Ashcraft v. Peoples Liberty Bank & Trust Co., Ky. App., 724 S.W.2d 228 (1987). Affirmed trial courts grant of Summary Judgment to defendant on plaintiff's claim for personal injuries resulting from a slip and fall in an icy parking lot in daylight. Held that prior Kentucky law on applicable legal duties remains unchanged by the adoption of comparative negligence.

2. Carlotta v. Warner, 601 F.Supp 749 (EDKY - 1985). Profoundly negligent plaintiff v. slightly negligent defendant. Plaintiff's negligence as "sole proximate cause".

3. Prior Kentucky law, that a party's negligence must be a "substantial factor" in causing injury presumably unchanged by the adoption of comparative fault. The "substantial factor" test in Kentucky is that set forth in the Restatement of Torts, Second, Section 431 (1965): The actor's negligent conduct is a legal cause of harm to another if: (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

4. With the adoption of comparative negligence, Kentucky juries decide, in answer to a single special interrogatory the question of whether a party has both breached a legal duty and that such breach was a substantial factor in causing the harm. Presumably, the jury can decide that a party was guilty of as little as 1% causative negligence. How much has to be assessed against a party to constitute a "substantial factor"? See Carlotta v. Warner, supra: "The Doctrine of Comparative Negligence does not mean that plaintiff is entitled to a recovery in some amount in every situation in which he can show some negligence of the defendant, however slight. If the plaintiff fails to establish that defendant's negligent act or omission was a substantial factor in causing harm to the plaintiff, or if there was a superseding cause, defendant will not be liable in any amount." Id., at 751. When can the court decide the question as a matter of law (as in Carlotta, awarding Summary Judgment to defendant), and when is it a jury question?

5. In cases in which there is a question of causation as such, it is probably the sole province of the jury. Despite Carlotta's discussion on causation, the real basis of the court's decision seems to be that there was no evidence of a breach of a legal duty that contributed to cause the harm.

H. Wrongful death action.

1. Under Kentucky's Wrongful Death Statute (KRS 411.130), the contributory negligence of the decedent has been a complete bar to recovery. Since the action is brought by a personal representative on behalf of the statutory beneficiaries of the

decedent, the separate negligence of a beneficiary is also factored in. There is a question whether the logic of the Reda Pump case would be applied to wrongful death actions as well. If the experience of other "pure" comparative negligence jurisdictions is followed, it is unlikely that this will occur. However, in an appropriate case, it is possible that the negligence of the decedent as well as the separate negligence of a beneficiary of the decedent can be separately calculated, and together will reduce the plaintiff's award.

APPENDIX 1

RESOURCE MATERIALS

1. Rogers & Shaw, A Comparative Negligence Checklist to Avoid Future Unnecesary Litigation, 72 Kentucky Law Journal 25.

2. Rogers, Apportionment in Kentucky After Comparative Negligence, 75 Kentucky Law Journal 103.

3. Woods, Henry, Comparative Fault, Second Edition, 1987, Lawyers' Co-operative Publishing Company.

4. Schwartz v. Comparative Negligence (1974).

THE UNIFORM COMPARATIVE FAULT ACT

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§ 22:1. Introduction.

The Uniform Comparative Fault Act has never been adopted in its entirety by any jurisdiction. It is however beginning to exert an influence on both statutory and decisional law. Parts of it have been enacted in several states and in others such as Missouri and Kentucky, it has been cited as a guideline in the cases adopting comparative fault. For this reason we are including a copy of the Act along with the Commissioners' Comments.

§ 22:2. Text of the act.

UNIFORM COMPARATIVE FAULT ACT

Section

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory

fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

COMMENT

This Section states the general principle, that a plaintiff's contributory fault does not bar his recovery but instead apportions damages according to the proportionate fault of the parties.

Harms Covered. The specific application of that principle, as provided for in this Act, is confined to physical harm to person or property. But it necessarily includes consequential damages deriving from the physical harm, such as doctor's bills, loss of wages or costs of repair or replacement of property. It does not include matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation. But failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application.

Conduct Covered. (a) Defendant's Conduct. The Act applies to "acts or omissions that are in any measure negligent or reckless toward the person or property . . . of others." This includes the traditional action for negligence but covers all negligent conduct, whether it comes within the traditional negligence action or not. It includes negligence as a matter of law, arising from court decision or criminal statute. "In any measure" is intended to cover all degrees and kinds of negligent conduct without the need of listing them specifically.

In some states reckless conduct goes by a different name, such as willful or wanton misconduct. The decision must be made in the particular state whether the language used is sufficiently broad for the purpose or if additional language is needed.

Although strict liability is sometimes called absolute liability or liability without fault, it is still included. Strict liability for both abnormally dangerous activities and for products

bears a strong similarity to negligence as a matter of law (negligence per se), and the factfinder should have no real difficulty in setting percentages of fault. Putting out a product that is dangerous to the user or the public or engaging in an activity that is dangerous to those in the vicinity involves a measure of fault that can be weighed and compared, even though it is not characterized as negligence.

An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

The Act does not include intentional torts. Statutes and decisions have not applied the comparative fault principle to them. But a court determining that the general principle should apply at common law to a case before it of an intentional tort is not precluded from that holding by the Act.

For certain types of torts, such as nuisance, the defendant's conduct may be intentional, negligent or subject to strict liability. In the latter two instances the Act would apply, but not in a case in which the defendant intentionally inflicts the injury on the plaintiff.

A tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault.

(b) Plaintiff's Conduct. "Fault," as defined in Subsection (b), includes conduct of the plaintiff or other claimant, as well as a defendant.

"Contributory fault chargeable to the claimant" includes legally imputed fault as in the cases of principal and agent and of an action for loss of services of a spouse. It also covers a situation in which fault is not imputed but would still have barred recovery prior to passage of the Act—as, for example, a wrongful-death action in which the decedent's contributory negligence would have barred recovery even though it was not imputed to the person bringing the action.

Contributory fault diminishes recovery whether it was previously a bar or not, as, for example, in the case of ordinary contributory negligence in an action based on strict liability or recklessness. Last clear chance is expressly included with its variations.

"Assumption of risk" is a term with a number of different meanings—only one of which is "fault" within the meaning of this Act. This is the case of unreasonable assumption of risk, which might be likened to deliberate contributory negligence and means that the conduct must have been voluntary and with knowledge of the danger. As used in this Act, the term does not include the meanings (1) of a valid and enforceable consent (which is treated like other contracts), (2) of a lack of violation of duty by the defendant (as in the failure of a landowner to warn a licensee of a patent danger on the premises), or (3) of a reasonable assumption of risk (which is not fault and should not have the effect of barring recovery).

"Misuse of a product" is a term also with several meanings. The meaning in this Section is confined to a misuse giving rise to a danger that could have been reasonably anticipated and guarded against. The Act does not apply to a misuse giving rise to a danger that could not reasonably have been anticipated and guarded against by the manufacturer, so that the product was therefore not defective or unreasonably dangerous.

The doctrine of avoidable consequences is expressly included in the coverage.

Causation. For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.

"Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seatbelt restraint played a part, and not, for example, to the damage to the car. A similar rule applies to a defendant's fault; a physician, for example, negligently setting a broken arm, is not liable for other injuries received in an automobile accident.

1979 Addition to Comment: *Adaptation of the Act to Modified Form of Comparative Negligence.* If a state now using the modified form of comparative negligence should decide that in the light of its experience it is wedded to that form and not willing to change to the pure form, the Act may be adopted for this purpose, as indicated below, by adding the words in italics:

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant, *if not greater than the combined fault of all other parties to the claim, including third-party defendants and persons released under Section 6,* diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) *Whenever both parties to a claim and counterclaim have sustained damage caused by fault or both, each party can recover from the other in proportion to their relative fault in accordance with Section 3, regardless of whose fault is the greater.*

(c) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting and enforceable express consent, measure of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

COMMENT

Parties. It is assumed that the state procedure provides for bringing in third-party defendants as parties. If not, the procedural statutes or rules may need to be amended to permit it, at least for purposes of contribution.

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants

who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

In situations such as that of principal and agent, driver and owner of a car, or manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault.

Percentages of fault. In comparing the fault of the several parties for the purpose of obtaining percentages there are a number of implications arising from the concept of fault. The conduct of the claimant or of any defendant may be more or less at fault, depending upon all the circumstances including such matters as (1) whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved, (2) the magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury, (3) the significance of what the actor was seeking to attain by his conduct, (4) the actor's superior or inferior capacities, and (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.

A rule of law that a particular defendant owes a higher degree of care (as in the case of a common carrier of passengers) or a lesser degree of care (as in the case of an automobile host in a state having a valid automobile-guest statute) or that no negligence is required (as in the case of conducting blasting operations in an urban area) is important in determining whether he is liable at all. If the liability has been established, however, the rule itself does not play a part in determining the relative proportion of fault of this party in comparison with the others. But the policy behind the rule may be quite important. An error in driving on the part of a bus driver with a load of passengers may properly produce an evaluation of greater fault than the same error on the part of a housewife gratuitously giving her neighbor a ride to the shopping center; and an automobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence in failing to discover the crack, properly be held to a greater measure of fault that another manufacturer producing a mechanical pencil with a defective clasp that due care would have discovered.

In determining the relative fault of the parties, the fact-finder will also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates, and that common law doctrine has been absorbed in this Act. This position has been followed under statutes making no specific provision for it.

Joint and Several Liability and Equitable Shares of the Obligation. The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligence or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.

The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

Reallocation. Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible. Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

Control by the court. The total of the several percentages of fault for the plaintiff and all defendants, as found in the special interrogatories, should add up to 100%. Whether the court will inform the jury of this will depend upon the local practice.

The court should be able to exercise any usual powers under existing law of setting aside or modifying a verdict if it is internally inconsistent or shows bias or prejudice, etc. On the same basis as the remittitur principle, a court might indicate its intent to set aside a percentage allocation unless the parties agreed to a somewhat different one.

Illustration No. 1. (Simple 2-party situation).

A sues B. A's damages are $10,000.

A is found 40% at fault.

B is found 60% at fault.

A recovers judgment for $6,000.

Illustration No. 2. (Multiple-party situation).

A sues B, C and D. A's damages are $10,000.

A is found 40% at fault.

B is found 30% at fault.

C is found 30% at fault.

D is found 0% at fault.

A is awarded judgment jointly and severally against B & C for $6,000. The court also states in the judgment the equitable share of the obligation of each party:

A's equitable share is $4,000 (40% of $10,000).

B's equitable share is $3,000 (30% of $10,000).

C's equitable share is $3,000 (30% of $10,000).

Illustration No. 3. (Reallocation computation under Subsection (d)).

Same facts as in Illustration No. 2.

On proper motion to the court, C shows that B's share is uncollectible. The court orders that B's equitable share be reallocated between A and C. The court orders that B's equitable share be allocated between A and C.

A's equitable share is increased by $1,714 (4/7 of $3,000).

C's equitable share is increased by $1,286 (3/7 of $3,000).

Section 3. [Set-off]

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

COMMENT

A set-off involves a single claim and counterclaim. If there are multiple defendants, separate set-off issues may arise between a claimant and each of several defendants, but each set-off would be a separate issue, determined independently of the others. The same principle applies in case of a cross-claim subject to a counterclaim.

Whether the rule is for or against set-off, if it should be applied categorically to all situations it would produce unfair results in some of them. In attaining a fair application to a particular factual situation, consideration needs to be given to the circumstances of whether each party is able to pay his obligation and whether the payment comes from his own pocket or from liability insurance covering him. The provisions of this Section provide a fair solution to each situation, as illustrated below.

Illustration No. 4. (Parties fully covered by liability insurance.) A sues B. B counterclaims. Each is found to have suffered $100,000 in damage. Each is fully covered by liability insurance. A is found 30% at fault. B is found 70% at fault. Under the statutory provision there is no set-off except by agreement of the parties, and it would not be in their best interests here to agree to a set-off. A recovers $70,000 from B, and B recovers $30,000 from A.

Illustration No. 5. (No insurance but both parties able to pay judgments.) The same facts as in Illustration 4, but there is no liability insurance. Each is able to pay the judgment against him. If the parties do not agree to a set-off, A receives $70,000 from B, and B receives $30,000 from A. For their own convenience they may find it simpler to agree on a set-off, with A receiving $40,000 from B.

Illustration No. 6. (No insurance; B is able to pay and A is not.) As in Illustration 4, each parth has $100,000 damages, A is 30% at fault and B is 70% at fault. Neither party has liability insurance coverage. B moves the court to require both parties to make payment into court for distribution. Finding it likely that A's obligation will be uncollectible the court issues the order. B pays into court $70,000; A can pay nothing. The court distributes $40,000 to A and $30,000 back to B. This is treated as if B had directly paid A $70,000 and A had directly paid B $30,000 and the obligations of both parties are extinguished.

Illustration No. 7. (A has insurance; B does not and is unable to pay.) The same facts as in Illustration 6, but B has no insurance and cannot pay, while A has full liability insurance. A's motion that both parties pay into court is granted. A's insurance company pays $30,000. A pays nothing. The court distributes the $30,000 to A. This extinguishes the liability of A and his insurance company under the liability coverage, and B's liability to A reduced from $70,000 to $40,000. For application of any uninsured-motorist coverage contained in A's insurance policy, the court's delivery of the $30,000 to A is treated as a direct payment by B to A.

Illustration No. 8. (Both parties have inadequate insurance coverage and no other available funds.)

A is 30% negligent, has damages of $50,000 and carries liability insurance of $20,000. B is 70% negligent, has damages of $100,000 and carries liability insurance of $30,000.

A therefore owes B $30,000 and has a claim against B of $35,000; and B owes A $35,000 and has a claim against A of $30,000.

On granting of a motion to pay into court, A's carrier pays $20,000 which is initially allocated to B as payment

to him of $20,000 and reduces A's debt to B to $10,000 and

B's carrier pays $30,000, which is initially allocated to A as payment to him of $30,000 and reduces B's debt to A to $5,000.

The court now reallocates to B $10,000 from A's initial allocation of $30,000, leaving $20,000 for A. It also reallocates to A $5,000 from B's initial allocation of $20,000, leaving $15,000 for B.

A is thus entitled to the $20,000 remaining in the initial allocation, plus $5,000 from the subsequent allocation, making a total of $25,000; and

B is entitled to the $15,000 remaining in the initial allocation, plus $10,000 from the subsequent allocation, making a total of $25,000.

Of the $50,000 paid in, A receives $25,000 and B receives $25,000. All obligations are discharged.

For a complex illustration like No. 8, the process of tracking literally the language of the Section is somewhat laborious and difficult to work out. Fortunately, it is possible to reach exactly the same result much more simply and easily by using the formula, D = C−O + P to determine the amount each claimant is entitled to receive. D signifies the amount to be distributed to the particular claimant from the funds paid into court; C signifies the amount of his claim after it has been reduced by the court because of his own negligence; O signifies the amount that he is found by the court to owe to the other party; and P signifies the amount that he has paid into court.

Use of this formula in each of illustrations above will reach exactly the same result as that which is stated in the illustration. Thus, in Illustration 8, the formula D = C − O + P operates like this: For A: $35,000-$30,000 + $20,000 = $25,000. For B: $30,000 − $35,000 + $30,000 = $25,000.

Observe that if use of the formula produces a negative number for one of the two parties, it corresponds with a number larger by that figure than the amount of deposit with the court and indicates that the party with the negative figure continues to owe that amount to the other party. This occurs, for example, in Illustration No. 7.

The system for distributing the funds outlined by the section is not the only one that could be utilized but it appears to be the fairest and most equitable. It gives due consideration to the relative amounts owed by each party and the relative amounts paid by each; and their relative fault is of course already taken into consideration in determining the amounts of their enforceable claims.

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a

settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

COMMENT

Sections 4, 5 and 6 are expected to replace the Uniform Contribution Among Tortfeasors Act (1955) in a state following the principle of comparative fault. The three sections, however, apply whether the plaintiff was contributorily at fault or not.

Section 4 is in general accord with the provisions of the 1955 Uniform Act, but the test for determining the measure of contribution and thus establishing the ultimate responsibility is no longer on a pro rata basis. Instead, it is on a basis of proportionate fault determined in accordance with the provisions of Section 2. A plaintiff who is contributorily at fault also shares in the proportionate responsibility.

Joint-and-several liability under the common law means that each defendant contributing to the same harm is liable to him for the whole amount of the recoverable damages. This is not changed by the Act. Between the defendants themselves, however, the apportionment is in accordance with the equitable shares of the obligation, as established under Section 2.

If the defendants cause separate harms or if the harm is found to be divisible on a reasonable basis, however, the liability may become several for a particular harm, and contribution is not appropriate. See Restatement (Second) of Torts § 433A (1965).

Section 5. [Enforcement of Contribution]

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of

action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

COMMENT

Illustration No. 9. (Equitable shares previously established by court).

A sues B and C. His damages are $20,000.

A is found 40% at fault.

B is found 30% at fault.

C is found 30% at fault.

A, with a joint-and-several judgment for $6,000 against B and C, collects the whole amount from B.

On proper motion to the court, B is entitled to contribution from C in the amount of $3,000.

Illustration No. 10. (Equitable shares not established).

A sues B. His damages are $20,000.

A is found 40% at fault.

B is found 60% at fault.

Judgment for A for $12,000 is paid by B.

B then brings a separate action seeking contribution from C, who was not a party to the original action.

C is found to be liable for the same injury, and as between B and C, C is found to be 50% at fault.

Judgment for contribution for $6,000 is awarded to B.

If A had voluntarily joined or been brought in as a party to this second action, proportionate fault would have been determined for all parties, including A and B, and contribution against C would have been awarded on that basis.

Section 6. [Effect of Release].

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

COMMENT

Effect of release on liability of other tortfeasors. The provision that release of one tortfeasor does not release the others unless the release so provides is taken from the Uniform Contribution Among Tortfeasors Act (1955). It is a common statutory provision.

Effect of release on right of contribution. The question of the contribution rights of tortfeasors A and B

against tortfeasor C, who settled and obtained a release or covenant not to sue admits of three answers: (1) A and B are still able to obtain contribution against C, despite the release, (2) A and B are not entitled to contribution unless the release was given not in good faith but by way of collusion, and (3) the plaintiff's total claim is reduced by the proportionate share of C. Each of the three solutions has substantial disadvantages, yet each has been adopted in one of the uniform acts. The first solution was adopted by the 1939 Uniform Contribution Act. Its disadvantage is that it discourages settlements; a tortfeasor has no incentive to settle if he remains liable for contribution. The second solution was adopted by the 1955 Contribution Act. While it theoretically encourages settlements, it may be unfair to the other defendants and if the good-faith requirement is conscientiously enforced settlements may be discouraged.

The third solution is adopted in this Section. Although it may have some tendency to discourage a claimant from entering into a settlement, this solution is fairly based on the proportionate-fault principle.

"Discharges . . . from all liability for contribution." A reallocated share of contribution, as provided in Section 2(d), comes within the meaning of this phrase, and the discharge of the released person under this Section applies to that liability as well. Since the claim is reduced by the amount of the released person's equitable share, the increased amount of that share as a result of the reallocation is charged against the releasing person.

Illustration No. 11. (Effect of release).

A was injured through the concurrent negligence of B, C and D. His damages are $20,000. A settles with B for $2,000.

The trial produces the following results:

A, 40% at fault (equitable share, $8,000)

B, 30% at fault (equitable share, $6,000)

C, 20% at fault (equitable share, $4,000)

D, 10% at fault (equitable share, $2,000)

A's claim is reduced by B's equitable share ($6,000). He is awarded a judgment against C and D, making them jointly and severally liable for $6,000.

Their equitable shares of the obligation are $4,000 and $2,000 respectively.

Illustration No. 12. Release to one tortfeasor another's share is uncollectible).

Same facts as in Illustration No. 11.

It is now found that D's share of $2,000 is uncollectible. Upon proper motion to the court that share is reallocated as follows:

A's equitable share is increased by ⅔ (his own proportionate fault), plus ⅔ (B's proportionate fault), or $1,556.

C's equitable share is increased by ⅓ or $444.

Immunities. The problem of a wrongdoer who is entitled to a legal immunity could be treated like a released tortfeasor in this Section—join him to the action to determine his equitable share of the obligation and subtract it from the amount of the claimant's recovery. But this would unfairly cast the whole loss on the claimant. This might be adjusted by spreading the immune party's obligation among all of the parties at fault, including the claimant, as in Subsection 2(d). But this same result is also accomplished by leaving the immune party out of the action altogether; a far easier and simpler solution. This Act therefore makes no provision for immunities. It must be borne in mind, however, that some states treat some immunities as not applying to a suit for contribution. This raises different problems, which can be handled under third-party practice.

Worker's compensation. An injured

employee who has received or is entitled to worker's compensation benefits from his employer may ordinarily bring a tort action against a third party, such as the manufacturer of the machine that injured him, and recover for his injury in full. Under the rule in most states, the defendant is not entitled to contribution from the employer, even though the employer was negligent in maintaining the machine or instructing the employee in its use. This casting of the whole loss on the tort defendant may be unfair and greatly in need of legislative adjustment. It is so affected by the policies underlying the worker's compensation systems, however, and these policies vary so substantially in the several states that it was felt inappropriate to include a section on the problem in a uniform act.

Several solutions are possible. Thus, contribution against the employer may be provided for. Or the recovery by the employee may be reduced by the proportionate share of the employer. Or the amount of that proportionate share may be divided evenly between the employer and employee, so that the compensation system bears responsibility for it. Provision also needs to be made for the relation of the tort defendant to the compensation benefits. In any event, contributory negligence on the part of the employee will come within the scope of this Act and will affect the amount of recovery.

Section 7. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. [Short Title]

This Act may be cited as the Uniform Comparative Fault Act.

Section 9. [Severability]

If any provision of this Act or application of it to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 10. [Prospective Effect of Act]

This Act applies to all [claims for relief] [causes of action] accruing after its effective date.

Section 11. [Repeal]

The following acts and parts of acts are repealed:

COMMENT

A state that has adopted either of the two Uniform Contribution Among Tortfeasors Acts will of course plan to repeal it. This is also true of other statutory provisions on contribution for tortfeasors.

This Act does not necessitate any changes in the statutory language of Article 2 of the Uniform Commercial Code, but it may have the effect of slightly modifying some of the Comments to §§ 2-314 to 2-316 and 2-715 on proximate cause and the effect of contributory fault.

WORKING TOWARD SETTLEMENT: ANALYZING STRATEGIES OF THE EXPERTS

By

E. Andre Busald
William J. Kathman, Jr.
Busald, Funk & Zevely
Florence, Kentucky

Section G

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E. Andre Busald William J. Kathman, Jr.

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NEGOTIATING

Based Upon

YOU CAN NEGOTIATE ANYTHING by Herb Cohen

I. Negotiation is a field of knowledge and endeavor that focuses on gaining the favor of people from whom we want things.

   A. Almost everything is negotiable, from prices to check-out times, because these things themselves are the products of negotiation.

   B. The three crucial variables to every negotiation are power, time and information. These determine success or failure.

II. Power is the capacity to get things done. It is a neutral concept, neither ethical or unethical.

   A. Complaints about power focus on two things:

      1. Unhappiness with the method of exercising power.

      2. Disapproval of the desired end being brought about by the use of the power.

   B. Power is in the eye of the beholder. Simply by believing you have power and conveying that impression you will cause the other party to the negotiation to behave as if you have power.

   C. Various sources of power in negotiations.

      1. By creating competition for something you possess.

      2. Legitimacy - official looking signs and documents carry a great deal of authority. However, this power can be challenged. Use the power of legiti-

macy when it will help you and challenge it when it will not.

3. Intelligent risk taking. When you can't afford to take a risk of losing something you have to have, you lose power.
4. Spead the risk out and gather support for your proposal from those on your side of the negotiation. Consolidate your position.
5. Specialized skills, experience, or technical knowledge.
6. Become aware of the real needs of your opponents. These may be very different than those issues which are stated openly.
7. The more time and effort an opponent has invested in the negotiation, the more power you have.
8. Rewards and punishments
   a) No one will really negotiate with you unless they think you can help or hurt them.
   b) Do not publicly eliminate options without getting something in return.
9. Get the other side to identify with you.
10. Use ethical and moral standards by pointing out that they are on your side.
11. Precedent - use it but don't be hidebound by it.
12. Persistence.
13. Persuasive ability - is more important than logic.
    a) The other person must understand what you're

saying.

b) The evidence should seem overwhelming.

c) Most importantly, there must be an appeal to the others needs and desires.

14. Increase your power by having a relaxed attitude. Usually, you will do a better job negotiating for someone else rather than yourself.

III. The passage of time dramatically affects negotiations.

A. The most significant concessions in any negotiation occur right before a party reaches their deadline.

B. The best strategy is not to reveal your real deadline to the other side.

C. Rapid action should only be taken when it will be to your advantage. Generally, this will be after a period of slow development as the other party's deadline approaches.

IV. Information is the heart of all negotiations.

A. Since it is so valuable, there usually must be a reciprocal exchange of information.

B. Effective listening and observation techniques can be a valuable source of information as to the other sides real needs.

V. A negotiating style of winning at all costs may be effective in a single instance, but it is counterproductive in a continuing relationship. This style is called the Win-Lose approach.

A. Six elements of Win-Lose negotiation.

1. Extreme initial positions.
2. Negotiators generally have very limited authority.
3. Emotional tactics. The best way to neutralize these is simply to perceive them for what they are.
4. Tendency to view concessions made by the other side as indications of weakness rather than good faith admissions or negotiations.
5. Reluctancy to make any concessions of their own.
6. Ignoring deadlines.

B. When faced with a Win-Lose negotiation you can either:
1. Cancel the negotiation or
2. Fight these tactics with your own or
3. Attempt to switch the relationship to a collaborative effort with two winners

VI. Win-Win negotations are those resulting in mutual satisfaction.

A. Use the process to meet the other side's needs as well as your own.

B. Attempt to harmonize or reconcile the real needs of those on each side of the negotiation.

C. Understand the causes of conflicts. They may come from experience, information, or the role they play in negotiating.

D. Build a relationship of trust between both parties.
1. This is a long process that should begin long

before the formal negotiation.

2. Conduct the formal negotiation by emphasizing the ends of the negotiation rather than the means involved.

E. There are two forms of opposition:

1. Idea opponents disagree on a particular issue. These can be converted to allies by examining real needs and seeking a compromise or alternative position.

2. Visceral opponents disagree with both your point of view and your particular personality. These generally can't be converted; it is best to simply avoid making these opponents.

a) Attitude is a leading cause of visceral opposition

b) Avoid judging the other's acts or motivations.

VII. Telephone Negotiations

A. These are more prone to causing misunderstandings. They are generally quicker and less likely to be successful

B. Negotiations are more competitive over the phone.

C. The advantage in phone negotiations is strongly with the caller because he can prepare in advance.

D. Always write a memorandum of agreement for all telephone negotiations. The party who writes the memorandum has a better position because he decides the form.

VIII. Negotiating with Organizations

A. Establish a relationship with one particular member and try to work through them.

B. If that is unsuccessful, move up another level in the heirarchy and try again.

C. The most important thing in any negotiation with an organization is to establish a personal relationship so that they will view you as a human being with wants and needs rather than a statistic.

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BOONE CIRCUIT COURT
FILE NO. _____

PATRICIA PLAINTIFF Plaintiff vs. DEFENDANT BUS TRANSIT Defendant	)	SETTLEMENT EVALUATION AND DEMAND AS OF 5/14/87

STATISTICAL DATA

NAME: Patricia Plaintiff

MARITAL STATUS: Married

WAGES: Patricia worked as a school teacher and earned an average weekly wage of $543.00. She also earned income as a Piano instructor. As a result of the wreck, Patty missed 70 days of teaching school and had to miss numerous lessons, sustaining a total loss of income of $7,823.00. Worker's compensation has paid approximately $4,300.00 of this amount.

MEDICALS

Plaintiff has incurred medical charges in the amount of $6,960.44 as a result of this wreck.

Michael A. Grefer, M.D. 10/25/84 - 9/02/86	$1,145.00
Richard T. Sheridan, M.D. 12/03/84 - 5/24/85	1,097.00
S. Michael Lawhon, M.D. 01/27/86 - 06/05/87	1,274.00
Peter J. Stearn, M.D. 03/05/86 and 01/19/87	95.00
Ayse Lee, M.D. 04/04/86 to 09/30/86	435.00

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Cincinnati Neurological 08/29/85 to 01/24/86	383.00
Radiology Associates 11/30/84 to 12/03/85	269.00
Thomas Mayer, M.D. 05/15/85 to 06/12/85	71.00
Anesthesia Associates 04/17/87	203.00
Christ Hospital 04/17/87	415.21
N.W. Schwegman, M.D. 12/02/85 to 12/16/85	110.00
St. Luke Hospital 11/30/84 to 12/03/85	424.50
St. Elizabeth Medical Center 12/15/84, 01/18/85	254.00
University Rehabilitation, Inc.	245.00
Prescriptions	539.73
TOTAL:	$6,960.44

CAUSE OF ACTION:

Patty brings this negligence action against Defendant Bus Transit. Defendant Bus Transit Company, was negligent by failing to provide Patty a reasonably safe bus and the driver was negligent for failing to keep a safe and clear distance ahead of him.

On November 28, 1984, Patricia Plaintiff was a passenger in a 1969 school bus owned and operated by a charter bus company, Defendant Bus Transit. The bus was taking Pat's third grade class on a field trip to the Symphony. Patty was sitting in the first seat of the bus on the curb side aisle. She was the

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second person seated in that bench, and was seated near the aisle as opposed to being seated near the window.

The Plaintiff's seat was unique in that it was the only seat on the old bus that did not have some type of forward protection. Every other person seated either had another seat or a protection panel in front of him. Patty's bench seat had a panel in front of it, but the panel only extended half way across the bench leaving her seat unprotected. As a result, any crash or sudden stop would create a greater danger for her than every other passenger on the bus.

As the bus was traveling along a city street, a car pulled out in front of the bus and stopped. As a result, the bus driver slammed his brakes and stopped suddenly. Patty Plaintiff was thrown from her chair, her hand and her arm struck an unpadded portion of a pole in front of her and she fell into the dashboard and down into the bus stairwell. The bus driver testified that when the car pulled in front of him, he thought it was going to immediately turn left onto another street. When the car could not make the turn, it stopped partially in the same lane as the bus occupied. The bus driver then slammed his brakes in an attempt to avoid a collision, throwing Patty into the pole in front of the bus causing her injury. No contact was made with the car and it was never identified.

EVALUATION

The Plaintiff asserts that the cause of her injury stems from the negligence of the bus driver in operating the bus, and in the negligence of the bus company by failing to provide her

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with a safe bus. These theories aren't alternative, but dual. The bus driver testified that he felt the car in front of him was going to make a turn onto another street and that he would be able to continue driving down the road. When the car had to stop because it could not make its turn, he then had to slam on his brakes in order to avoid a collision. Given that this was a chartered bus engaged in the business of transporting passengers for hire, the bus company owed Patricia a duty of utmost skill and foresight. Shelton Taxi v. Bowling, Ky. 51 S.W.2d 468 (1932). The Plaintiff submits that the bus driver failed to use utmost skill which other skilled bus drivers would have used under the same situation.

The Plaintiff further alleges that the bus company was negligent by failing to provide a safe bus. In 1977, Federal Regulations mandated forward protection for all buses manufactured thereafter. This wreck occurred seven years after that regulation took effect and although the bus was manufactured in 1969, the Defendant was put on notice that an exposed seat creates a great hazard. A bus company using utmost skill and foresight would take measures to protect passengers from the dangers of that seat. The Plaintiff plans to call to trial Dr. Arthur Yeager, D.D.S., an expert in the field of bus safety. Dr. Yeager is very familiar with the school bus industry and has long advocated seat belts and increased padding on buses. He will testify that this incident should have been prevented by eliminating the seat or using it last, providing a seat belt for that seat, adding a full protection panel in front

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of the seat, and as a minimum alternative by padding the pole in front of the seat from top to bottom. The Plaintiff submits that the Defendant bus company had a duty to modify its buses as science and skill made known over time. Riley v. Louisville and N.R. Company, Ky, 21 S.W.2d 990 (1929). Since 1977, science and skill made known that the failure to provide forward protection creates a great risk to passengers.

As a result of being thrown from her seat into the pole in front of her and into the dashboard, Patty suffered a severe cervical and lumbar strain, ringing in her ears with possible temporo mandibular joint problems, right lateral epicondylitis, paronychia and dislocation of R-2 finger and subsequently underwent surgery on her right elbow. As a result of these injuries, Patricia had to miss several days of school and was unable to play her musical instruments which provided a great deal of pleasure for her.

DEMAND

After conferring with our client and reviewing this file, we are in a position to place a settlement demand upon you in the amount of $75,000.00. Within that number, we will negotiate a full settlement with the worker's compensation carrier. We think this offer represents a reasonable opening demand. We feel that we have a very solid case of liability, based on the

fact that the common carrier owes the highest duty of care.

Respectfully submitted,

BUSALD FUNK ZEVELY

By: _____
E. ANDRE' BUSALD

and

By: _____
WILLIAM J. KATHMAN
Attorneys for Plaintiff
226 Main Street
Florence, KY 41042
(606) 371-3600

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July 27, 1987

Mr. E. Andre' Busald
Mr. William J. Kathman
BUSALD FUNK ZEVELY
226 Main Street
Florence, KY 41042

RE: Plaintiff v. Defendant Bus Transit

Dear Andy and Bill:

After reviewing this file, I feel that your opening demand of $75,000.00 is not at all reasonable. I feel that your opinion that you have a very solid case of liability is unfounded. As you know, witnesses have testified that the driver operating the bus had no time to bring the bus to a safe stop in avoiding collision with the unknown vehicle in front of him.

I do not feel that the bus company was in any way negligent by providing Patty transportation in Bus No. 104. This bus complies with all State and Federal Regulations, and cannot be fitted with a protection panel extending all the way in front of the bench seat in question, for it would block the aisle way and would create even a greater hazard. The Federal regulations which you allude to in your demand settlement package are not applicable to this bus in that it was not manufactured in 1977 or later. The bus company does not have a duty to provide an absolutely 100% safe bus.

Also, we feel many of the medical bills which you have submitted are not related to the incident in question. Patricia had complained of neck and back problems prior to the accident and was being treated for those problems. Also, her tennis elbow problems are very probably the result of her continuous violin practice. It is not an uncommon situation to find a violinist with tennis elbow problems such as Pattys. She has testified that she practices two to three hours a day, seven days a week and such strain on the elbow could definitely cause the discomfort she has developed. It is also obvious that the ringing problem Patty had with her ears has been solved and that no further complications with TMJ are anticipated. We simply do not feel that the great nature and extent of her injuries as described is the result of this incident. Perhaps the dislocation of her right finger was the result of hitting a bar or some object in front of her, but we do not feel that her $7,000.00 medical and $7,000.00 wage loss is attributable to this

event, and further do not feel that it could have been prevented by the Defendant.

However, in order to avoid further litigation, and with the consent of my client, I am in the position to offer you an amount of $12,000.00 to fully settle any claims against the Defendant. Within that number you would of course have to negotiate a settlement with the worker's compensation carrier.

Sincerely yours,

Defendant Lawyer

SAMPLE: FORM FOR CLIENT'S AUTHORIZATION OF SETTLEMENT FIGURES

Client: _____

Client's Authority

1. Date: _____ I authorize settlement for $_____ gross.

_____
Client

2. Date: _____ I authorize settlement for $_____ gross.

_____
Client

3. Date: _____ I authorize settlement for $_____ gross.

_____
Client

4. Date: _____ I authorize settlement for $_____ gross.

_____
Client

Record of Negotiation

1. Date: _____ Demand made: $_____ Date: _____ Offer: $_____
2. Date: _____ Demand made: $_____ Date: _____ Offer: $_____
3. Date: _____ Demand made: $_____ Date: _____ Offer: $_____
4. Date: _____ Demand made: $_____ Date: _____ Offer: $_____

Client's Final Authority

Date: _____ I authorize my Attorneys to proceed to trial unless an offer of not less than $_____ gross is received.

_____
Client